Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

THE ARIZONA DEPARTMENT
OF CORRECTIONS, *et al.*,

Petitioners,

v.

EVAN ARTHUR HOOK, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In considering a State's motion to modify institutional prison injunctions that require the State to pay the costs associated with special masters in light of a newly passed state statute that requires approval of such payments by the State's Legislature, does a district court abuse its discretion when it fails to consider anew whether available alternatives, including the appointment of a magistrate, are equally viable, constitutionally acceptable methods for monitoring compliance with the injunctions, so that any conflict between the federal injunctions and the state law can be avoided?

PARTIES TO THE PROCEEDING BELOW

Petitioners are the Arizona Department of Corrections, the State of Arizona, and Samuel A. Lewis, the former Director of the Arizona Department of Corrections ("ADOC").

The Respondents are Arizona inmates who brought civil rights actions challenging various conditions at the Arizona prisons. In *Hook v. State of Arizona*, District Court No. CIV 73-0097 PHX CAM ("*Hook*"), the inmates included Evan Arthur Hook, John Purdy, Muriel R. Thigpen, Gregory A. Cottrell, Donald Adsitt, Jr., Murry Mathews, Christopher Keohane, Michael A. Troutman, Daniel Gutierrez, James Lee Littrell, and Clifton Blockinger. The *Hook* action is now pursued on behalf of current inmate beneficiaries of a Consent Decree entered in 1973. In *Gluth v. Arizona Department of Corrections, et al.*, District Court No. CIV 84-1626 PHX CAM ("*Gluth*"), the inmate class representative is Alan L. Gluth. In *Casey v. Lewis, et al.*, District Court No. CIV 90-0054 PHX CAM ("*Casey*"), the class representatives are Fletcher Casey, Jr., Stephen James, Frank Bartholic, Armando Munoz, Kyle Baptisto, David A. Mann, Jeffrey Lustig, Terry Don McFalls, Randy Sampson, John Tomlin, Scott Tramposch, Pamela McQuillen, Carolyn Ferguson, Yvonne Martin, David Tucker, Susan Colker, John Myers, Mary Jo Booker, Randy Thomas, Ruth Johnson, Roman Stone, and Robert Bankston.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeal's Amended Opinion affirming denial of Petitioners' Motion for Modification is reported at 107 F.3d 1397, and is set forth in Appendix ("App.") A. The final order of the United States District Court for the District of Arizona, filed November 14, 1995, is not reported, and is reprinted in Appendix B. The district court order denying Petitioners' modification request, filed October 17, 1995, is reported at 907 F. Supp. 1326. App. C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its initial Opinion on February 27, 1997. On April 22, 1997, the court denied rehearing, but issued an Amended Opinion. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are Federal Rule of Civil Procedure 53 and Arizona

Revised Statutes Annotated ("A.R.S.") § 35-152, which are reproduced in Appendices D and E.

STATEMENT OF THE CASE

This case raises questions concerning the proper deference that federal courts must pay to duly enacted laws of a state legislature. Petitioners' central point is this: a federal court is constitutionally empowered to impose and maintain a remedial measure that conflicts with state law only if it fully considers the proper balance of federalism, and decides that it has no other choice because it cannot adequately achieve its remedial objectives by any other means. To be sure, when a federal court determines that a federal substantive constitutional or statutory right conflicts with state law, the contrary state law must fall. But if a federal substantive right can be enforced or vindicated through imposition of a remedial measure that respects state law, a federal court must, under our federalist constitutional order, select that remedial measure rather than a competing remedial alternative that overrides state law.

This fundamental principle of judicial federalism is not controversial. It flows naturally and inexorably from the comity and respect that each sovereign in our federal system owes to the other. Indeed, this Court has recognized in a variety of contexts that "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990). It follows that a federal

court seeking to vindicate federal substantive rights should at every step in the litigation of institutional injunctions refuse to override state law unless it has "assure[d] itself that no permissible alternative would have accomplished the required task." *Id.* This Court's review is required because neither court below applied the proper analysis.

A. General Background

This appeal arises out of four separate prisoner civil rights actions[1] in which the same district court judge, the Honorable Carl Muecke, appointed special masters to develop remedies and oversee compliance with injunctive relief or consent decrees entered in prisoner class action litigation. The first special master was appointed at state expense in 1989 to recommend relief and oversee compliance for a legal access program at one prison unit.[2] By

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[1] *Hook v. State of Arizona*, District Court No. CIV 73-0097 PHX CAM ("*Hook*"); *Gluth v. Arizona Department of Corrections, et al.*, District Court No. CIV 84-1626 PHX CAM ("*Gluth*"); *Casey v. Lewis, et al.*, District Court No. CIV 90-0054 PHX CAM ("*Casey*"); and *Arnold v. Lewis*, District Court No. CIV 91-1808 PHX CAM ("*Arnold*").

[2] The first master was appointed in *Gluth v. Kangas*, 773 F. Supp. 1309 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (9th Cir. 1991), a case dealing with legal access issues for inmates at the Central Unit of ADOC's Florence facility. Following the submission of a final report and the entry of an injunction, the masters were ordered to conduct three evaluations of conditions at the Florence prison at six month intervals. Although a motion to terminate the appointment is pending, a special master continues to monitor prison activities at this unit to this day.

1995, special masters had been appointed to oversee virtually every aspect of prison life in both newly filed cases and cases involving old consent decrees that were revived from their dormancy.[3]

Under the injunctions, Petitioners must pay the masters' fee requests within two weeks of the receipt of each bill, and are required to fund bank accounts, upon which the masters may draw money for their expenses, with a minimum account balance for each case. It is not until after the bills are paid that the special master must submit an itemized statement of all expenses incurred for which withdrawals were made, giving the State no opportunity to review the reasonableness of the expenses. By 1995, the masters had charged the taxpayers of Arizona over $291,000 in fees. With this background in mind, the Arizona Legislature enacted A.R.S. § 35-152, effective July 13, 1995. Subsection C states:

> An officer, employee, or agent of this State shall not pay fees and expenses for special masters

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[3] As a result of this Court's decision in *Lewis v. Casey*, 116 S. Ct. 2174 (1996), the legal access portion of the *Casey* litigation is now dismissed and the special master appointed to oversee statewide compliance with the voided legal access injunction is now moot. However, a special master exists in *Casey* as a result of the district court's decision in *Casey v. Lewis*, 834 F. Supp. 1477 (D. Ariz. 1993) (finding that ADOC's treatment of mentally ill inmates did not meet constitutional standards). Also, although a motion is pending to terminate the appointment, a special master remains in the *Gluth* litigation. Finally, in *Hook*, the court appointed a special master to monitor compliance with a 1973 consent decree setting forth regulations governing inmate mail.

> appointed by a federal court unless the legislature appropriates monies for the payment of the special master fees and expenses.

After the statute became effective and the first special master payments came due in August 1995, the ADOC Director at the time, Sam Lewis, made several attempts to obtain payment of the special master's fees and expenses (as required by the district court orders) from the responsible state officials.[4] None of these efforts succeeded.

B. Proceedings Below.

On August 16, 1995, the Petitioners initiated this action by separately moving to amend the injunctions in each of the cases and moving to consolidate the cases for consideration of the modification requests. Among the relief Petitioners suggested was the replacement of the special masters with a magistrate judge. The inmate Plaintiffs in *Gluth* and *Hook* followed with separate petitions to compel payment of the special master fees and for an order holding ADOC's Director, Samuel Lewis, in contempt for failing to pay the special master's fees. The

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[4] Director Lewis could not pay the special master's fees out of his agency's budget because that would expose him, and the special masters to suit, and personal civil liability under A.R.S. §§ 35-211 and -213, which strictly regulate the spending of state money for its appropriated purpose. So, the Director asked both the Governor and the Legislature to appropriate the money necessary to pay the special master fees and expenses.

matters were consolidated and heard by District Court Judge David A. Ezra.

On October 17, 1995, the district court issued an Opinion and Order holding Director Lewis in contempt, finding A.R.S. § 35-152 to be unconstitutional, compelling payment of the special master's fees, and denying Petitioners' motion to modify. The district court first found that any changes to the injunctions in response to a change in state law would give the State "unbridled authority to enact statutes in order to insulate it from federal court orders and from federal laws." App. C at 55. Second, the district court found that, when Judge Muecke originally appointed the special masters, he was aware of the alternatives available and made the decision that a special master was best suited to monitor the injunctions. App. C at 57-58. The court concluded that nothing had occurred subsequent to that decision, including the passage of A.R.S. § 35-152, to demonstrate that Judge Muecke's decision was incorrect. App. C at 58.

Judge Ezra did not himself consider anew the proper balance of federal and state law in light of the new enactment of Arizona's Legislature, or consider whether the federal rights underlying the injunctions could be equally protected by the appointment of a magistrate in place of the special masters. Instead, he deferred to Judge Muecke's earlier decision, despite the fact that Judge Muecke appointed the special masters prior to the enactment of the state law requiring legislative approval of state payments of the master's fees, and thus was not confronted with conflicting state law. Judge Ezra did not address the Petitioners' argument that, had A.R.S. § 35-152 been in place prior to the entry of the remedial

orders at issue in these cases, Judge Muecke would have been obliged – under this Court's repeated admonition to avoid unnecessary conflicts with state law and to accomplish remedial objectives through a readily available alternative – to assign the masters' functions to a magistrate judge.

Later in his decision, Judge Ezra stated that "a modification of the court order would indeed perpetuate the identified constitutional violations" citing to a statement by one of the special masters that a modification "might threaten to undermine the substantive provisions of the injunctions." App. C at 72 and 72 n.34. However, the court again failed to decide for itself whether any specific available alternative – including the appointment of a magistrate judge – could fulfill the necessary monitoring role.

Shortly after the district court's ruling, Petitioners paid the outstanding fees and expenses. On November 2, 1995, the court issued sanctions, including a coercive sanction of $10,000 per day for any future non-compliance with orders regarding payment of special master fees, and an award of attorney's fees. A written Order followed on November 14, 1995, from which the Petitioners timely appealed.

The Ninth Circuit affirmed the district court's denial of Petitioners' modification request. App. A. The court found that it was enough that the district court "found that the appointment and retention of the special masters was necessary to vindicate the prisoners' constitutional rights," App. A at 17, and in a footnote, stated that the district court had in fact "considered the alternatives

presented by the defendants including the substitution of a magistrate judge for the special masters, but found there were no effective alternatives to vindicate the prisoners' constitutional rights." App. A at 17 n.5. The court also stated that it agreed with the district court's assessment. *Id.*

REASONS TO GRANT THE PETITION

THIS COURT SHOULD ACCEPT THIS PETITION TO DECIDE IMPORTANT AND NOVEL QUESTIONS OF FEDERALISM, TO CORRECT THE LOWER COURTS' MISAPPLICATION OF THIS COURT'S PRIOR DECISIONS, AND TO RESOLVE THE CONFLICT BETWEEN THE LOWER COURTS' DECISIONS AND THOSE OF OTHER APPELLATE COURTS.

The lower courts' rulings in this case implicate perhaps the most fundamental principle underlying the unique federal system of government devised by the framers of our Constitution: " 'the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.' " *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citation omitted). It is in deference to the States' sovereignty that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

This Court has recognized a variety of limitations on federal judicial power growing out of the comity and respect owed by the federal government to the States.[5] Of dispositive relevance to this case is the principle that, in deciding whether to modify institutional injunctions involving state agencies, the district court should "defer" to the legitimate concerns of local officials, including those related to financial constraints imposed by federal court orders. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392-93 (1992). This principle is the judicial analog to the preemption cases in which a federal statute is said to conflict with state law. In such circumstances, this Court has found preemption only "where it is impossible . . . to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (citations omitted).

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[5] In *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 1639 (1995), Justice Kennedy's concurrence listed no fewer than five such limitations: doctrines such as abstention, *see, e.g., Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the rules for determining the primacy of state law, *see, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the doctrine of adequate and independent state grounds, *see, e.g., Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874); *Michigan v. Long*, 463 U.S. 1032 (1983), the whole jurisprudence of preemption, *see, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and many of the rules governing our habeas jurisprudence, *see, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Rose v. Lundy*, 455 U.S. 509 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

In this case, Arizona's statute requiring legislative approval of the State's payment of special master fees does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives" of the district court in monitoring and enforcing its orders in view of the availability of a magistrate judge to perform the functions assigned to the special masters. There can be no question that the district court had a readily available alternative to the special masters to ensure compliance with its substantive orders. The very rule upon which the special master orders are based, Federal Rule of Civil Procedure 53(a), contemplates an alternative to paying outside special masters to act on the court's behalf in appropriate cases: "this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master." The Advisory Committee explained that Rule 53(a) was amended because "[t]he creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, *eliminates the need to appoint standing masters.*" Advisory Committee Note to 1983 Amendment to Rule 53(a) (emphasis added).

Thus, it is not surprising that courts routinely appoint magistrate judges to serve as special masters. *See, e.g., Parker v. Dole*, 668 F. Supp. 1563 (N.D. Ga. 1987); *Morse v. Marsh*, 656 F. Supp. 939 (N.D. Ill. 1987); *see also United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 n.5 (9th Cir. 1990) (retired magistrate who had previously been involved in the litigation while serving as a magistrate appointed special master). Here too, the district court plainly could have achieved its remedial objectives through appointment of a magistrate judge as special

master, and thereby " 'take[n] into account the interests of state and local authorities in managing their own affairs,' " *Spallone v. United States*, 493 U.S. 265, 276 (1990) (citation omitted), thus avoiding the necessity of striking down a state statute.

The district court here did not independently find that the injunctions' remedial objectives would be frustrated or impaired by the appointment of a magistrate judge to undertake the functions assigned to the special masters. Instead, the court found that "Judge Muecke was aware of the court's alternatives and made a determination that a special master was best suited to perform the demanding monitoring and reporting functions." App. C at 57-58; *see also Id.* at 58 (alternative of utilizing a special master was "necessarily considered by Judge Muecke when he determined that the appointment of special masters was vital"). The obvious flaw in this reasoning is that Judge Muecke appointed the special masters *before* the enactment of a state law prohibiting the use of state funds to pay them. Accordingly, Judge Muecke had no obligation (or even reason) to consider designation of a magistrate judge to perform the special masters' functions. If he did consider this alternative (and there is no indication in the records of any of these cases that he did),[6] he could

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[6] In support of its assertion that use of a magistrate judge was "necessarily considered by Judge Muecke," the district court cites only to a colloquy from the contempt hearing, not to any part of the record showing Judge Muecke's analysis. *See* App. C at 58 (citing Transcript of Contempt Hearing, September 28, 1995, at 34-37). The district court simply ignored Arizona's argument, made again here, that Judge Muecke made his remedial choice before A.R.S. § 35-152 had been enacted.

very well have decided to employ the special masters even if he concluded that use of a magistrate judge would also have achieved the court's remedial objectives. Such a decision was well within Judge Muecke's discretion because at that time state law was indifferent to which alternative he chose.

More important is that neither the district court, nor the court of appeals, decided anew the proper balance between the federal injunctions at issue and the new state law. The closest either court came was the district court's statement that "a modification of the court order would indeed perpetuate the identified constitutional violations." App. C at 72. However, this comment was not based on principles of federalism, or any analysis of the underlying rights at issue, but was premised solely on a statement by one of the special masters that a modification "might threaten to undermine the substantive provisions of the injunctions." App. C at 72 and 72 n.34.

Moreover, this finding only addresses half of the question raised by the modification requested – it did not address whether the magistrate judge could just as effectively carry out the monitoring functions of the special masters. Thus, the ultimate error that requires this Court's attention is that neither court below squarely addressed whether the replacement of the special masters with a magistrate judge, who could perform all of the functions assigned to the special master, would negatively affect the implementation of the court's remedies so as to justify the nullification of a statute passed by the Arizona Legislature.

In striking down A.R.S. § 35-152, the district court reasoned that granting the motion to modify the special master orders would give the State "unbridled authority to enact statutes in order to insulate [the State] from federal court orders and from federal laws." App. C at 55. This characterization fundamentally misconstrues the State's position. Arizona has never questioned the proposition that federal law is the supreme law of the land. Nor has it ever disputed the venerable authority of the federal courts "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Rather, our position rests on the modest and straight-forward assertion that statutes duly enacted by one of the sovereign States are also "laws" that the federal courts are bound to respect except in the rare circumstance that they conflict with the "supreme law of the land" – the Constitution or a federal statute. If the federal court has the means to fully vindicate federal law while at the same time respecting state law, its duty "to say what the law is" requires it to respect state law. In short, we do not assert that Arizona has any authority to insulate itself from federal law, and its authority to insulate itself from federal court orders, far from being unbridled, is limited to circumstances where its enactments do not preclude the federal courts from enforcing federal law or from effectively remedying violations of federal law.

To the extent the district court's holding rests on the view that the States may never enact laws that conflict with provisions of a federal court order not necessary to the vindication of federal law, its holding is wholly contrary to uniform precedent from this Court, and other

federal appellate decisions. This Court has repeatedly "emphasized that although the 'remedial powers of an equity court must be adequate to the task, . . . they are not unlimited.' " *Jenkins*, 495 U.S. at 51 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)). In particular, " 'the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.' " *Spallone*, 493 U.S. at 276 (1990) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)). As the First Circuit put it in a somewhat different context, "[t]he supremacy clause of the Constitution . . . is concerned with promoting the supremacy of federal *law*, not federal courts." *Nashoba Communications Ltd. Partnership No. 7 v. Town of Danvers*, 893 F.2d 435, 440 (1st Cir. 1990) (emphasis added). Accordingly, while there can be no question that a federal court may override state statutes that conflict with substantive federal constitutional or statutory rights, it may not invalidate a state statute that merely impedes one of several alternative remedial measures available to the federal court to vindicate federal law. By definition, such a statute is not in *conflict* with federal law; it simply requires that federal law be enforced through different means.

Thus, if a court has a choice of adequate remedial methods for enforcing federal rights, one of which does not conflict with state law, it must choose the remedial method that does not override the State's sovereignty. In other words, if federal and state law can coexist, federal courts are obliged to ensure that they do coexist.

Neither Article III nor the Supremacy Clause empower the federal judiciary to *gratuitously* invalidate

state statutes. If the court can vindicate federal rights through means permitted under state law, there is simply no *need* – and thus no judicial authority – to utilize means that violate state law. This basic principle of federalism, and fundamental limitation on federal remedial authority, has been applied by this Court in a number of closely analogous cases. For example, in *Jenkins* this Court said that, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local governmental institutions." 495 U.S. at 51. For this reason, the Court held that before taking the "drastic step" of circumventing local authority in devising the means to remedy the constitutional violation found in that case, "the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task." *Id.* Because the district court in *Jenkins* had not fulfilled this obligation, the Court ruled that it had abused its discretion – in that case, by employing a method of raising revenue to support its remedial order notwithstanding the availability of alternatives that better preserved extant state law. *Id.*[7]

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[7] *See also Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) (per curiam) (" 'whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should . . . honor state policies in the context of congressional reapportionment' ") (quoting *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (citation omitted)); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law' ") (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)).

Notwithstanding the district court's unfounded concern with the State's ability "to enact statutes in order to insulate it from federal court orders," App. C at 55, this principle of judicial federalism applies with equal force where, as here, state law conflicting with a remedial provision of a federal court order is enacted *after* the decree is already in place. Indeed, this was precisely the situation addressed by the Ninth Circuit in *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995). The injunction in that case had been entered in 1992. The California Legislature passed Bill 35 in June 1993. Plaintiffs sought a contempt finding in late October 1993 in response to California's enforcement of the law, and the State asked the district court to modify the injunction in early December. *Id.* at 603. In that case, the Ninth Circuit reversed a district court's refusal to modify an injunction because the court did not consider if the new state law conflicted with applicable federal law. *Id.* at 603-04.

The First Circuit likewise has recently addressed this situation, and it reached the same conclusion, reversing the district court's refusal to modify an injunctive decree governing the Massachusetts Treatment Center for Sexually Dangerous Persons. *King v. Greenblatt*, 52 F.3d 1 (1st Cir.), *cert. denied*, 116 S. Ct. 175 (1995). The 1974 decree in *King*, in accordance with then-existing state law, vested authority and responsibility for the operation of the treatment center with the Massachusetts Department of Mental Health ("DMH"). *Id.* at 2. In 1994, however, the Massachusetts Legislature enacted a statute transferring control over the treatment center from the DMH to the Massachusetts Department of Corrections ("DOC"). *Id.* at 3. The state then asked the district court to modify the

decree to reflect this change in state law, but the court declined to do so. *Id.* The First Circuit reversed, holding that "[t]he Constitution itself is indifferent to whether DOC or DMH administers the Treatment Center." *Id.* at 4. The court explained that "if the terms [of the decree affected by the new state statute] . . . were directly *mandated* by the Constitution, a change in state law without more would not warrant modification." *Id.* But where the affected terms of the injunction merely "lay the groundwork for other remedial measures," *id.*, the respect due a sovereign State requires "a 'careful case-specific inquiry' into both the decree and the statute 'to discover whether their objectives and provisions necessarily conflict and to consider the importance of the areas of conflict to the overall goals of the litigation.' " *Id.* at 5 (citation omitted).

Here, A.R.S. § 35-152 does not conflict with any of the substantive constitutional rights found by the district court, only with the means (payment of the special masters) selected by the court to ensure those rights. Under the unbroken line of cases from both this Court and other federal appellate courts, the remedial means chosen by a district court to ensure compliance with its order must be modified to harmonize it with contrary state law unless no adequate alternative means are available to the court. Yet the district court and the court of appeals did not find that the prisoners' federal rights would be frustrated by the appointment of a magistrate judge to undertake the functions assigned to the special masters. Without this finding, the lower courts' decisions cannot stand.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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July 21, 1997

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EVAN ARTHUR HOOK, In re Hook plaintiffs in CV-73-0097-PHX-CAM; ALAN L. GLUTH, In re Gluth plaintiffs in CV-84-01626-PHX-CAM; FLETCHER CHARLES CASEY, JR., In re Casey plaintiffs in CV-90-00054-PHX-CAM, *Plaintiffs-Appellees,* v. ARIZONA DEPARTMENT OF CORRECTIONS, *Defendant-Appellant.*	No. 95-17317 D.C. No. CV-73-00097-CAM

EVAN ARTHUR HOOK, In re Hook plaintiffs in CV-73-0097-PHX-CAM; ALAN L. GLUTH, In re Gluth plaintiffs in CV-84-01626-PHX-CAM; FLETCHER CASEY, JR., In re Casey plaintiffs in CV-90-00054-PHX-CAM, *Plaintiffs-Appellees,* v. ARIZONA DEPARTMENT OF CORRECTIONS, *Defendant-Appellant.*	No. 96-15642 D.C. No. MISC-95-00086 ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
David A. Ezra, District Judge, Presiding

Argued and Submitted
September 20, 1996 – San Francisco, California

Filed February 27, 1997
Amended April 22, 1997

Before: Robert R. Beezer and David R. Thompson, Circuit Judges, and Irma E. Gonzalez,* District Judge.

Opinion by Judge Thompson

SUMMARY

Individual Rights/Civil Rights

The Court of appeals affirmed orders of the district court. The court held that a state's passage of a contrary statute cannot avoid a federal court's order to pay a special master appointed to monitor compliance with a civil rights injunction and decree.

In civil rights actions by appellee Evan Hook and other inmates of appellant Arizona Department of Corrections (ADOC), the district court entered a consent decree and injunctions and appointed a special master to monitor compliance. The court also ordered the ADOC to pay the special master's fees and expenses. The Arizona Legislature enacted Arizona Revised Statute § 35-152, which prohibited payment of the special master's fees

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* Honorable Irma E. Gonzalez, District Judge for the Southern District of California, sitting by designation.

and expenses without a legislative appropriation. The state legislature made no such appropriation.

Appellant Samuel Lewis, the director of the ADOC, unsuccessfully sought payment from the relevant state agency, the legislature, and the Governor of Arizona. The state moved to modify the consent decree and injunctions to eliminate the requirement of a special master. The prisoners moved to compel payment and to hold Lewis in contempt.

The district court declined to modify the injunctions and decree and held Lewis in contempt. Pending a hearing on sanctions, the state paid the special master's fees and expenses. At the hearing, the court noted the state's continuous history of noncompliance with the court's orders and imposed a coercive monetary fine for future noncompliance with the special master provisions. The ADOC and Lewis appealed.

[1] Appointment of a special master is not an appealable order when it does not modify any provision of an injunction or consent decree. [2] The defendants were not appealing from the appointment of a special master. Based on an intervening statute, they sought to modify the injunctions and consent decree to eliminate the special master provisions by substituting a magistrate judge. By denying the motion, the district court required the defendants to continue paying the master's fees and expenses. The denial had an injunctive effect because the defendants had to pay or be subject to contempt. Denial of the motion was appealable.

[3] If an interlocutory order is appealable, a party may immediately appeal without awaiting entry of a final

judgment. If the party does not immediately appeal, the party may appeal the interlocutory order after entry of a final judgment. A party does not lose the right to appeal an interlocutory order by not immediately appealing and awaiting final judgment.

[4] The modification and contempt motions were brought after entry of the final injunctions and consent decree. The modification order merged into the later contempt order, so that the "final" order resolving the entire dispute was the contempt order. [5] The notice of appeal, which was filed within 30 days of the contempt order in which the court imposed sanctions, was timely.

[6] Under the Supremacy Clause, a state law is void if it actually conflicts with the Constitution or a federal statute. A state statute need not directly violate the Constitution or a federal statute to be in violation of the Supremacy Clause.

[7] The district court found that the special master was necessary to vindicate the prisoners' civil rights because the court did not have the resources to monitor compliance with the injunctions and decree. This was required because of the defendants' history of noncompliance and continuous attempts to alter the orders without pursuing a motion for modification under Fed. R. Civ. P. 60(b).

[8] Consistent with the Supremacy Clause, the prisoners' civil rights precluded the application of § 35-152 to defeat them. The district court did not err in denying the modification motion.

[9] The Eleventh Amendment does not bar the imposition of costs to secure compliance with prospective relief or costs that are incidental or ancillary to prospective relief.

[10] The district court has wide latitude in determining whether there has been contemptuous defiance of its order. [11] The defendants did not timely pay the special master's fees and expenses. This was a violation of the court's orders. The burden shifted to Lewis to demonstrate that he took all reasonable steps within his powers to ensure compliance with the injunctions and decree.

[12] Lewis's efforts did not evidence any attempt to comply with the court orders, or that he took all steps he could to avoid violating the district court's orders to pay the fees and expenses. [13] Although inability to comply with a court's order is generally a complete defense to a coercive civil contempt sanction, Lewis's asserted impossibility failed to establish this defense. [14] Compliance was not physically impossible; funds were available and the bills were eventually paid.

[15] Lewis was not relieved of his obligation to comply with the court's orders simply by filing a Rule 60(b) motion. A motion under Rule 60(b) does not affect the finality of a judgment or suspend its operation. [16] Lewis could have obtained a ruling before being cited for contempt, and could have presented the State's arguments in a Rule 60(b) motion to modify the injunctions and decree before the payments became due. Lewis did not move for modification until after the payments were past due and unpaid.

[17] The district court documented the defendants' history of noncompliance with the injunctions and decree. [18] The court could not be assured that the defendants would comply with the orders in the absence of a coercive sanction. The defendants could have avoided any monetary fine by complying with the court's orders.

[19] A "prevailing party" is eligible for an award of attorney fees in a civil rights action. Because there was no special circumstance justifying denial of a fee award, the prisoners' counsel were entitled to reasonable fees on appeal.

COUNSEL

Thomas J. Dennis, Assistant Attorney General, Phoenix, Arizona, for the defendant-appellant.

Joel W. Nomkin, Brown & Bain, Phoenix, Arizona, for the Gluth plaintiffs-appellees.

Andrew S. Gordon, Coopersmith & Gordon, Phoenix, Arizona, for the Hook plaintiffs-appellees.

ORDER

The opinion filed February 27, 1997 is amended as follows:

1. At slip opinion page 2088 a reference to footnote 5 is inserted at the end of the first sentence of the first

paragraph, which ends with "the prisoners' constitutional rights." Footnote 5 is inserted into the opinion. This footnote reads:

> 5/ Contrary to the defendants' argument, the district court considered the alternatives presented by the defendants including the substitution of a magistrate judge for the special masters, but found there were no effective alternatives to vindicate the prisoners' constitutional rights. We agree with this assessment.

2. At slip opinion page 2092, a reference to footnote 6 is inserted at the end of the fourth line of the text, at the end of the sentence ending "determined by the district court." Footnote 6 is inserted into the opinion. This footnote reads:

> 6/ An award of fees also would be appropriate under the standard set forth by the PLRA because the fees were "directly and reasonably incurred in proving an actual violation" of the prisoners' rights. PLRA § 7(d)(1)(A).

3. The insertion of the above footnotes and footnote references will change the final footnote reference in the opinion to footnote 7, both in the text and in the footnote itself at slip opinion 2092.

With the foregoing amendments, the panel has voted unanimously to deny the petition for rehearing. Judge Thompson voted to reject the suggestion for rehearing en banc and Judges Beezer and Gonzalez so recommend. The suggestion for rehearing en banc has been circulated to the full court and no judge of the court has called for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

THOMPSON, Circuit Judge:

In each of four prisoner civil rights actions, the district court entered a consent decree or an injunction and appointed a special master to monitor compliance with the decree and injunctions. Thereafter, the Arizona Legislature enacted Arizona Revised Statute Section 35-152. This statute prohibits the payment of fees and expenses incurred by a special master appointed by a federal court, unless the state legislature appropriates funds for such payment.

The defendants moved to modify the consent decree and injunctions to eliminate the requirement of a special master. The district court denied the motion and held the director of the Arizona Department of Corrections (Department), Samuel Lewis, in contempt of court for failing to pay the special masters' court ordered fees and expenses.

The defendants appeal the district court's order denying their modification motion and the court's order holding Lewis in contempt. They contend newly enacted section 35-152 required the district court to grant their modification motion and excused their failure to pay the special masters' fees and expenses.

As discussed more thoroughly below, we have jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and

1292(a)(1). We affirm the district court's denial of the modification motion and its contempt order.[1]

FACTS

The present appeal involves four prisoner civil rights actions: *Hook v. State of Ariz., Gluth v. Arizona Dep't of Corrections,* and two cases entitled *Casey v. Lewis.* In each case, the defendants were subject either to an injunction or a consent decree. Also, in each case, the district court appointed a special master to monitor compliance with the injunctions and consent decree and ordered the Department to pay the fees of the special masters on a timely basis and to maintain an account with a minimum balance that the masters could use for expenses. These orders require the special masters to submit a statement of fees by the first of the month and the defendants to pay the fees within fourteen days of receipt of the statement. The defendants also are required to maintain a minimum account balance of $5,000 in each of the *Gluth* and *Casey* cases and $3,000 in the *Hook* case.

After these orders were entered, the State of Arizona enacted Arizona Revised Statute Section 35-152. This section provides:

> A. An officer, employee or agent of this state shall not open and maintain an account for the

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[1] We do not consider the applicability, if any, of the Prison Litigation Reform Act (PLRA), Pub.L. No. 104-134, 110 Stat. 1321 (1996), to this appeal. A motion for modification, based on the PLRA, is currently pending before the district court. The applicability of the PLRA to these cases should be decided, in the first instance, by the district court.

purpose of paying fees and expenses that are incurred by a special master who is appointed by a federal court.

B. Notwithstanding any law to the contrary, an officer, employee or agent of this state is not subject to personal liability for complying with subsection A.

C. An officer, employee or agent of this state shall not pay fees and expenses for special masters appointed by a federal court unless the legislature appropriates monies for the payment of the special master fees and expenses.

D. Notwithstanding any law to the contrary, the failure of the legislature to appropriate monies for the payment of fees and expenses for special masters appointed by a federal court does not subject an officer, employee or agent of this state to personal liability for the special master fees and expenses.

E. This section applies to all bills for fees and expenses for special masters appointed by a federal court that are submitted after the effective date of this section.

Ariz. Rev. Stat. § 35-152.

Section 35-152 became effective on July 13, 1995. On August 1 and 2, 1995, the special masters submitted their invoices for services performed during July 1995. Under the court's orders, the defendants were required to pay the bills by August 16, 1995. The defendants did not pay the bills, did not maintain the minimum account balances, and the State Legislature did not appropriate funds for the fees and expenses. Instead, on the date payment was due, the defendants filed a motion to modify the

district court's orders regarding the timing of payments of the special masters' fees and expenses to allow presentment of the statements to the Arizona Legislature, as required by section 35-152. The defendants contended the district court should substitute a magistrate judge for the special masters to avoid a conflict with section 35-152. The prisoners responded with a petition to compel payment and moved the district court to hold Lewis in contempt.

On September 28, 1995, the district court heard the parties' motions. At that time, the defendants had not paid the bills submitted for July or August 1995. The district court declined to modify the injunctions and decree and found Lewis in civil contempt. The district court set a date of November 1, 1995, to hear argument on the appropriate contempt sanctions. Two days prior to the hearing, the defendants paid the two outstanding invoices and replenished the expense accounts.

The district court noted the defendants' "continuous history of noncompliance" with the court's orders and imposed a coercive fine of $10,000 per day for future noncompliance with the special master provisions. The defendants appeal from the district court's orders denying their modification motion and holding Lewis in contempt.

DISCUSSION

A. Jurisdiction

We first must determine whether we have jurisdiction over this appeal. The parties do not dispute that we

have jurisdiction over the district court's post-judgment contempt order. *See Stone v. City and County of San Francisco*, 968 F.2d 850, 854-55 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993). The prisoners argue, however, that we do not have jurisdiction over the district court's order denying the defendants' modification motion.

[1] In this argument, the prisoners contend that "[o]rders of reference to a master are generally interlocutory and not appealable." *National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 540 (9th Cir. 1987); *see also Thompson v. Enomoto*, 815 F.2d 1323, 1326-27 (9th Cir. 1987). In *Mullen* and *Thompson*, we concluded the appointment of a special master was not an appealable order under 28 U.S.C. § 1292(a)(1) because the appointment did not modify any provision of an injunction or consent decree.

Section 1292(a)(1) allows appeals of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . . " 28 U.S.C. § 1292(a)(1). In *Thompson*, we explained the appointment did not modify a consent decree because the decree contemplated the appointment and, thus, the appointment was "pursuant to, and not a modification of, the original consent decree." *Thompson*, 815 F.2d at 1327.

[2] The present case is distinguishable. The defendants are not appealing from the appointment of or reference to a special master. Instead, based on an intervening state statute, the defendants seek to modify the injunctions and consent decree to eliminate the special master

provisions by substituting a magistrate judge for the special masters. By denying the defendants' motion, the district court has required the defendants to continue paying the masters' fees and expenses. The denial has an injunctive effect because the defendants must timely pay the fees and expenses or be subject to contempt. The denial of the motion, therefore, is appealable under section 1292(a)(1). *See Stone*, 968 F.2d at 859 (defining modification as "chang[ing] the underlying legal relationship between the parties").[2]

The next question is whether the defendants filed a timely notice of appeal.

On October 17, 1995, the district court granted the prisoners' contempt motion and denied the defendants' modification motion. On November 14, 1995, the district court granted the prisoners' request for attorney fees and costs and imposed sanctions for the contempt. The defendants filed their notice of appeal on November 20, 1995.

We requested supplemental briefing on the question whether the defendants were required to file a notice of appeal within thirty days of the October 17th order or whether the defendants could appeal from the modification order by filing a notice of appeal within thirty days of the November 14th order. Having read and considered the parties' supplemental briefs, we conclude the notice of appeal was timely.

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[2] The *Hook* case involves a consent decree rather than an injunction. However, a consent decree is "sufficiently injunctive in nature" and, thus, an order modifying or refusing to modify a decree may be appealable under section 1292(a)(1). *Thompson*, 815 F.2d at 1326.

[3] If an interlocutory order is appealable, a party may immediately appeal that order without awaiting entry of a final judgment. *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). However, if the party does not immediately appeal, the party may appeal the interlocutory order after entry of the final judgment. *Id.* A party does not lose the right to appeal an interlocutory order by not immediately appealing and waiting for the final judgment. *Id.* "[T]he interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment." *Id.*

[4] In the present case, the modification and contempt motions were brought after entry of the final injunctions and consent decree. In the unique circumstances of this case, the modification order merged into the later contempt order, so that the "final" order resolving the entire dispute was the later contempt order. *See id.*

The modification and contempt issues were consolidated. Both issues were interrelated. The defendants sought to modify the injunctions and decree to remove the special masters. Lewis was held in contempt for failing to pay the special masters. The district court held two hearings and issued two orders only because, at the time the court heard the motions for modification and contempt, the court did not want to get into the question of what contempt sanction it might impose if indeed the court held Lewis in contempt. The court stated it wanted to avoid any "spillover" effect.

[5] We conclude the notice of appeal from the modification order was timely. It was not filed within thirty days of the district court's denial of the modification

motion, but it was filed within thirty days of the interrelated and consolidated contempt order in which the district court imposed contempt sanctions.[3] We next consider the merits of the defendants' modification motion.

B. Motion for Modification

The defendants argue the district court abused its discretion by refusing to modify the injunctions and consent decree to eliminate the requirement of a special master. The defendants argue (1) principles of federalism require the modification and (2) under the Eleventh Amendment, the State cannot be ordered to pay the special masters' fees and expenses.[4]

We review for abuse of discretion the district court's ruling on a modification motion. *United States v. State of Or.*, 769 F.2d 1410, 1416 (9th Cir. 1985). However, due to

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[3] The defendants argue the notice of appeal was timely because no separate document was entered after the orders, as required by Federal Rule of Civil Procedure 58(a); and, alternatively, that the unique circumstances doctrine applies. Because of our resolution of the timeliness issue in the manner stated above, we need not reach these arguments.

[4] The modification issue is now moot in *Casey v. Lewis*, 834 F. Supp. 1553 (D. Ariz. 1992). The Supreme Court recently reversed the injunction in that case on the basis that the prisoners did not demonstrate actual injury supporting the statewide and broad injunction issued by the district court. *Lewis v. Casey*, 116 S. Ct. 2174 (1996). The injunction in the other *Casey v. Lewis* case remains in effect. *See Casey v. Lewis*, 834 F. Supp. 1477 (D. Ariz. 1992).

federalism concerns implicated by institutional injunctions, we "scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' constitutional rights and does not require more of state officials than is necessary to assure their compliance with the constitution." *Touissant v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). "[T]he scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only." *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995). With respect to the consent decree in *Hook*, the defendants must demonstrate that a "significant change" in fact or in law warrants the modification. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-84, 112 S. Ct. 748, 116 L.Ed.2d 867 (1992).

1. Federalism Concerns

The defendants first argue that the enactment of section 35-152 raises federalism concerns and requires the requested modification to the injunctions and consent decree. The defendants contend that, to vindicate a federal right, the district court may not choose a remedial measure that conflicts with state law unless that measure is necessary to remedy the violation.

[6] It is well established that, under the Supremacy Clause, a state law is void if it actually conflicts with the United States Constitution or a federal statute. *See Clark*, 60 F.3d at 603. A state statute, however, need not directly violate the Constitution or a federal statute to be in violation of the Supremacy Clause. "[O]therwise valid state laws . . . cannot stand in the way of a federal court's

remedial scheme if the action is essential to enforce the scheme." *Stone*, 968 F.2d at 862.

[7] In the present case, the district court found that the appointment and retention of the special masters was necessary to vindicate the prisoners' constitutional rights. The district court found that the "Special Masters were appointed after court monitoring alone had been demonstrated to be inadequate." The district court appointed the special masters because the court did not have the resources to constantly monitor compliance with the injunctions and decree. This was required because of the defendants' history of noncompliance and continuous attempts to alter the orders on their own without pursuing a motion for modification under Federal Rule of Civil Procedure 60(b).

[8] In light of this history, the district court found that retention of the special masters was necessary to vindicate the prisoners' constitutional rights.[5] These rights, consistent with the Supremacy Clause, preclude the application of section 35-152 to defeat them. Accordingly, the defendants' reliance on Arizona Revised Statute Section 35-152 to support their modification motion is misplaced, and the district court did not err in denying that motion.

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[5] Contrary to the defendants' argument, the district court considered the alternatives presented by the defendants including the substitution of a magistrate judge for the special masters, but found there were no effective alternatives to vindicate the prisoners' constitutional rights. We agree with this assessment.

2. Eleventh Amendment

The defendants contend the Eleventh Amendment prohibits the court from ordering the state to pay the special masters' fees and expenses. We disagree.

[9] The Eleventh Amendment does not bar the imposition of costs to secure compliance with prospective relief or costs that are incidental or ancillary to prospective relief. *Missouri v. Jenkins*, 495 U.S. 33, 56 n. 20 (1990); *Hutto v. Finney*, 437 U.S. 678, 690 (1978); *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984).

C. Civil Contempt

Lewis argues the district court erred by holding him in civil contempt because (1) it was impossible for him to comply with the injunctions and decree due to section 35-152, and (2) the district court should have imposed a less severe sanction.

[10] We review for abuse of discretion the district court's civil contempt order, including the decision to impose sanctions. *Reebok Int'l v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir.), *cert. denied*, 116 S. Ct. 276 (1995). The district court "has wide latitude in determining whether there has been contemptuous defiance of its order." *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984).

[11] The defendants did not timely pay the special masters' fees and expenses. This was a violation of the court's specific and definitive orders. The burden of going forward thus shifted to Lewis to demonstrate he took "all reasonable steps within [his] power to insure

compliance" with the injunctions and decree. *See Sekaquaptewa v. MacDonald*, 544 F.2d 396, 403-04 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

Lewis contends he could not comply with the district court's orders because the Arizona Legislature has exclusive control over the expenditure of state funds and it did not appropriate funds for the special masters pursuant to section 35-152. Thus, Lewis could not pay the special masters' fees and expenses without violating section 35-152. He contends further that he took all the steps he could to pay the special masters in accord with section 35-152.

[12] With regard to Lewis's efforts to seek payment in compliance with section 35-152, he asserts he unsuccessfully sought payment from the Department of Administration-Risk Management Division, sought to place the matter before the Legislative Committee that handles interim budget requests, and asked the Governor to call a special session of the State Legislature to enact an appropriation bill to pay the special masters' fees and expenses. The district court correctly found these efforts evidenced Lewis's attempt to comply with Arizona's state law, but did not evidence an attempt to comply with the federal court orders requiring payment of the special masters' fees and expenses. Lewis did not demonstrate he took all the steps he could to avoid violating the district court's orders to pay the fees and expenses.

[13] Lewis also argues that section 35-152 made it impossible for him to comply with the injunctions and decree because he would have had to violate state law to

comply with the federal court orders. We reject this argument. Although inability to comply with a court's order is generally a complete defense to a coercive civil contempt sanction, *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 (9th Cir. 1983), Lewis's asserted impossibility fails to establish this defense.

The Third Circuit rejected a similar argument in *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628, 638 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984). In *Halderman*, the district court issued an injunction, appointed a special master, and required the defendants to pay the special master's fees. Thereafter, the State enacted an appropriations bill which, in effect, prevented payments to the special master. The defendants did not make the payments, and the district court held the Secretary in contempt. On appeal, the Secretary argued it was impossible for her to comply with the injunction due to the passage of the preventive appropriations bill.

[14] The Third Circuit rejected the Secretary's argument. The Third Circuit concluded the impossibility defense relates to "literal physical impossibility of compliance" and not to a subsequent change in the law that allegedly makes compliance illegal. *Id.* In *Halderman*, as in the present case, compliance was not physically impossible; funds were available for payment and the bills eventually were paid. The defendants do not assert that the State had insufficient funds and was financially incapable of making the payments.

[15] Lewis attempts to distinguish *Halderman* on the ground that, in *Halderman*, the defendants did not bring a

Rule 60(b) motion, whereas here they did. This is not a persuasive distinction. Lewis was not relieved of his obligation to comply with the court's orders simply by filing the Rule 60(b) motion. Rule 60(b) expressly states that, "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." Fed.R.Civ.P. 60(b).

[16] Lewis, of course, could have obtained a ruling from the court before being cited for contempt. He could have presented the State's arguments in opposition to the injunction and decree by bringing a motion under Federal Rule of Civil Procedure 60(b) to modify the injunctions and decree, before payment of the fees became due. Section 35-152 was enacted in April and became effective in July. Lewis did not move the court for modification until August, after the payments were past due and unpaid. Lewis had ample prior opportunity to test the validity of section 35-152 in relation to the injunctions and decree.

Finally, the defendants argue the district court erred by not imposing a less severe sanction. The defendants suggest the district court should have limited the contempt sanctions to a holding that section 35-152 is unconstitutional and ordering payment of the fees and expenses. We disagree.

[17] The district court documented the defendants' extensive history of noncompliance with the injunctions and decree. The defendants consistently violated the injunctions and decree and attempted to change them without first bringing a motion to modify. In an earlier appeal in the *Hook v. Lewis* case, we explained, "As the district court held, the proper approach . . . is to bring a

Rule 60(b) motion; the Department cannot simply disregard the consent decree." *Hook v. State of Ariz.*, 972 F.2d 1012, 1017 (9th Cir. 1992).

[18] The record reflects that the district court could not be assured the defendants would comply with the orders in the absence of a coercive sanction. Further, the defendants can avoid incurring any monetary fine simply by complying with the court orders. The district court did not abuse its discretion.

D. Attorney Fees

[19] The prisoners' counsel seek attorney fees on appeal as prevailing parties. A "prevailing party" is eligible for an award of attorney fees in a civil rights action brought under 42 U.S.C. § 1983. 42 U.S.C. § 1988; *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1534 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1537 (1994). Because there is no special circumstance justifying a denial of a fee award, we grant the request for reasonable fees on appeal. The amount of these fees shall be determined by the district court.[6]

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[6] An award of fees also would be appropriate under the standards set forth by the PLRA because the fees were "directly and reasonably incurred in proving an actual violation" of the prisoners' rights. PLRA § 7(d)(1)(A).

We also affirm the district court's award of attorney fees in that court.[7]

AFFIRMED.

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[7] The Supreme Court's reversal of the injunction in *Casey v. Lewis* and the Court's issuance of a stay of the injunction in May 1994 does not affect the district court's award of fees in this case. The issues on which the award was based, the modification and contempt issues, are separate from the validity of the underlying injunction. Further, the *Casey* plaintiffs' efforts were in connection with the other *Casey* action, which was not affected by the Supreme Court's decision.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EVAN HOOK, et al.,
Plaintiffs,
vs.
STATE OF ARIZONA,
Defendant.

No. MC 95-86 PHX CAM
No. CIV 73-0097 PHX CAM
No. CIV 84-1626 PHX CAM
No. CIV 90-0054 PHX CAM
No. CIV 91-1808 PHX CAM
(consolidated)

[PAYMENT OF SPECIAL MASTER FEES]

ORDER

ALAN L. GLUTH,
Named Class Representative,
vs.
ARIZONA DEPARTMENT OF CORRECTIONS, et al.,
Defendants.

(Filed Nov. 14, 1995)

FLETCHER CASEY, et al.,
Plaintiffs,
vs.
SAMUEL A. LEWIS, et al.,
Defendants.

CHARLES L. ARNOLD, guardian ad litem on behalf of H.B., et al.,

Plaintiffs,

vs.

SAMUEL LEWIS, et al.,

Defendants.

ORDER GRANTING PLAINTIFFS' ATTORNEYS' FEES AND COSTS AND IMPOSING COERCIVE CIVIL SANCTIONS AGAINST DEFENDANTS

DAVID ALAN EZRA, District Judge[1]

On October 17, 1995, the court entered an Order granting Plaintiffs' Motion to hold Samuel Lewis in Contempt; finding Ariz. Rev. Stat. Ann. § 35-152 unconstitutional; and denying Defendants' Motion for modification. *See Hock v. State of Arizona*, No. MC 95-86 PHX CAM. 1995 WL 628468 (D. Ariz. Oct. 17, 1995). Thereafter, the court set a hearing date of November 1, 1995, to hear argument on the appropriate contempt sanctions to be imposed. Andrew S. Gordon of Coppersmith & Gordon appeared at the hearing on behalf of the Plaintiffs in *Hook v. State of Arizona*. Joel W. Nomkin and Kirsten B. Rosati of Brown & Bain appeared at the hearing on behalf of the Plaintiffs in *Gluth v. Kangas*. Alice L. Bendheim of Bendheim & Whitten appeared on behalf of the Plaintiffs in *Casey v.*

[1] This court is sitting by designation of the Chief Judge of the Ninth Circuit and with approval of the Chief Judge of the District of Arizona.

Lewis. Craig Stephan appeared on behalf of the Special Masters, Dan Pochoda and Janet Bliss. Assistant Arizona Attorney General James Morrow and Charles J. Cooper of Shaw, Pittman, Potts & Trowbridge appeared at the hearing on behalf of Defendants in all three cases. After hearing the supporting and opposing arguments and reviewing the memoranda, the court GRANTS Plaintiffs' motion for reasonable attorneys' fees and costs, and imposes the coercive civil sanctions set forth below.

BACKGROUND

In this contempt proceeding, Plaintiffs originally requested that the court order payment of all outstanding Special Masters' fees (accrued during July, August and September 1995), and attorneys' fees and costs incurred in bringing the instant contempt action. In addition, the *Gluth* Plaintiffs asked the court to impose a daily civil sanction against Director Lewis if Lewis failed to pay the outstanding invoices within five days of the entry of this order.

On October 30, 1995, two days before the sanctions hearing, Defendants paid in full all outstanding Special Masters' invoices, totalling $38,328.29. In addition, Defendants replenished the expense accounts of the Special Masters, totalling $8,000.00. Plaintiffs' petition for payment of the outstanding invoices has therefore become moot.

DISCUSSION

At the hearing, Plaintiffs requested the court to award attorneys' fees and costs against the Defendants since Plaintiffs brought and prevailed in this contempt action.[2] Plaintiffs further urged the court to put in place a sanctions mechanism, i.e., a coercive civil contempt remedy, to ensure that Defendants comply with court orders to pay Special Masters' fees in the future.

Defendants concede that Plaintiffs are entitled to recover reasonable attorneys' fees and costs but dispute the necessity of a coercive civil contempt remedy. Defendants contend that since Ariz. Rev. Stat. Ann. § 35-152, the "impediment" to payment of the Special Masters, was declared unconstitutional by this court, the State will be able to pay all invoices in a timely manner. Defendants also assert that a sanctions order (other than an order granting Plaintiffs' attorneys' fees and costs) would be

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[2] Plaintiffs seek an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988, which provides that a district court, "in its discretion, may allow the prevailing party [in a § 1983 action] other than the United States, a reasonable attorney's fee as part of the costs." Plaintiffs alternatively petition this court to impose attorneys' fees and costs against Defendants pursuant to its inherent contempt power. *See* 18 U.S.C. § 401(3) (providing that "[a] court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command"); *see also Hutto v. Finney*, 437 U.S. 678, 692 (1978) (an award of attorneys' fees for bad faith can serve the same purpose as a remedial fine imposed for civil contempt).

"redundant" to this court's contempt order and Judge Muecke's other orders. This court cannot agree.

As this court stated in its Order of October 17, 1995, Defendants, and in particular, Director Sam Lewis, have established a continuous history of non-compliance with respect to orders that have been entered in *Hook*, *Gluth*, and *Casey*. Contrary to Defendants' assertions, their recalcitrance was evident long before Ariz. Rev. Stat. Ann. § 35-152 was enacted by the Arizona Legislature. Indeed, the Ninth Circuit recently affirmed the *Hook* order of June 3, 1994, holding Director Lewis in civil contempt for violating the October 19, 1973 Consent Decree. *See* Nos. 94-16190, 95-15105, 1995 WL 620939 (9th Cir. Oct. 19, 1995). Moreover, this court cannot take Defendants at their word that they will now, because of the October 17, 1995 Order, comply with existing court orders; the court especially notes Director Lewis' blatant refusals to accept the fact that this court recently held him in contempt.[3]

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[3] There is ample evidence for this court to question Defendants' representation that they will comply in the future with existing court orders. Indeed, Director Lewis firmly asserts that he has not acted contemptuously. For example, the day after this court's recent contempt ruling, Director Lewis appeared at a hearing of the Arizona Joint Legislative Budget Committee and asserted that he had done nothing wrong and believed that he did not receive a fair hearing before this court:

> I would like to directly state that I have never been in contempt, I have not taken any contemptuous action. . . . [I]n the latest case of the special master, it is absolutely astounding to me that [ ] any court in this land could hold a person in contempt of court who is confronted with a statute on the one hand that prohibits the payment and an order on the other hand

The court therefore finds that some coercive mechanism is necessary to ensure timely payment to the Special Masters in the future.

"Civil contempt is characterized by the court's desire to compel obedience to a court order or to compensate the contemnor's adversary for the injuries which result from the noncompliance." *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983) (internal quotations omitted) (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966) and *Gompers v. Bucks Stove & Range*

> that demands the payment. . . . [I]t seems to me the most reasonable action was to go ahead and contest this [ ] in the court and expect that you would receive some kind of reasonable, fair, and impartial ruling, which in fact did not occur.

Gluth Plaintiffs' Memorandum of Recent Events Pertinent to Contempt Sanctions, Attachment 5, at 1-2. Lewis continued on to state that he believed the District Court of Arizona was "out of control." *Id.* at 4.

Notably, on October 17, 1995, the same day that this court issued its order holding Samuel Lewis in contempt, Governor Fife Symington issued a press release stating in part:

> Once again, judicial power is imposed in this state in favor of criminals and against the state officials who have the responsibility of dealing with them. . . . [t]he criminals of America have found too many faithful friends among judges. . . . Sam Lewis is a valued servant to the people of Arizona and he has done nothing wrong. He has only obeyed state law. He has my full support.

The foregoing statements, made in the aftermath of this court's contempt order, persuade this court that the Defendants simply do not acknowledge their responsibility to obey court orders until they have been stayed, modified or overturned.

Co., 221 U.S. 418, 448-49 (1911)).[4] A contempt fine is considered civil and remedial if it either coerces the contemnor into compliance or compensates the complainant for losses sustained. *See International Union, UMWA v. Bagwell*, 114 S.Ct. 2552, 2558 (1994) (citing *United States v. United Mine Workers of Am*, 330 U.S. 258, 303-04 (1947)). There are two forms of civil contempt: compensatory and coercive. *See United States v. Asay*, 614 F.2d 655, 659 (9th Cir. 1980).

Since Defendants have paid all outstanding Special Masters' invoices (for fees accrued from July through September) compensatory fines are not warranted. However, in light of Defendants' past conduct and blatant disregard of court orders in both *Hook* and *Gluth* – including the conduct that this court has recently found contemptuous – the court reaches the inescapable conclusion that a coercive,[5] per diem contempt fine of $10,000.00 is

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[4] In contrast, the main purpose of criminal contempt is to "punish past defiance of a court's judicial authority, thereby vindicating the court." *Falstaff*, 702 F.2d at 778. The primary beneficiaries of a criminal contempt order are the courts and the public interest. *Id.* A court cannot impose criminal penalties on someone who has not been afforded the constitutional protections required in criminal proceedings. *See International Union, UMWA v. Bagwell*, 114 S. Ct. 2552, 2556 (1994).

[5] The court recognizes that its power to impose coercive civil contempt depends upon the ability of a contemnor to comply with the court's orders. *See Shillitani*, 384 U.S. at 371. However, as noted in this court's October 17, 1995 order, Defendants have not, and cannot, argue that they lack the funds to pay the Special Masters' fees. *See* 1995 WL 628468, at *11 (D. Ariz. Oct. 17, 1995).

necessary.[6] In determining this $10,000.00 per diem amount, this court has duly considered the "character

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[6] The Supreme Court has noted, "[a] close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged." *International Union*, 114 S. Ct. at 2558. In *International Union*, the Court fine-tuned the distinguishing characteristics between criminal and civil contempt fines, and concluded that fines of "$100,000 for any future violent breach," and "$20,000 for any future nonviolent infraction" of an injunction prohibiting specific conduct by a labor union constituted criminal sanctions that were unconstitutionally imposed. *Id.* at 2562.

The fines in *International Union*, however, are distinguishable from the per diem fines which the court imposes here; the fines in that case were "not coercive day fines, or even suspended fines, but [were] more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed." *Id.* The Court has also stated, "[i]f the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order." *Hicks v. Feiock*, 485 U.S. 624, 632 (1988).

Moreover, the Third Circuit implicitly upheld a $10,000 per diem sanction for nonpayment in similar circumstances. *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984). That case involved a district court order appointing a special master to supervise the planning and implementation of remedial measures to address, inter alia, constitutional violations of mentally retarded plaintiffs in a state institution. *Id.* at 629-30. Pursuant to the district court's order, the Commonwealth of Pennsylvania bore the costs of the special master's office. *Id.* at 630-31. The district court imposed a civil fine of $10,000 per day for each day that

and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of [the] suggested sanction." *United Mine Workers*, 330 U.S. at 304 (*cited in General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986)). In addition, the court notes that any coercive civil sanction imposed by this order will not be paid by Sam Lewis personally but rather by the State of Arizona. The coercive sanction must be of an amount sufficient to achieve the desired deterrent effect but not so large as to amount to an excessive penalty. The $10,000 per day sanction here accomplishes both purposes.

By disobeying court orders and failing to pay the July, August and September 1995 invoices when they became due, Defendants demonstrated that they were able to temporarily, and almost permanently, disable the Special Masters' offices. It is this court's hope that the coercive fine imposed will deter Defendants from repeating their conduct. By imposing this type of sanction, the court is explicitly "afford[ing] [Defendants] an opportunity to purge" because they can completely avoid the payment of such fines through compliance. *See International Union*, 114 S. Ct. at 2558.

In addition, the court hereby orders Defendants to pay reasonable attorneys' fees and costs incurred by Plaintiffs in bringing this contempt action. Defendants have raised specific objections to, and petitioned the court for an in-camera inspection of, fees charged by Craig Stephan, counsel to the Special Masters. *See*

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the full payment was not made pursuant to the court's order. *Id.* at 634.

Defendants' Motion for In-Camera Inspection, filed October 2, 1995. This court has continually stated that objections going to the reasonableness of Special Masters' fees are properly raised only before Judge Muecke and that Defendants will not be permitted to raise such objections before this court. However, if Defendants have objections relating to the reasonableness of attorneys' fees awarded pursuant to *this Order*, this court will duly consider them provided the objections are raised in accordance with the procedures set forth below. The court emphasizes that the relief ordered herein is intended to supplement the provisions of the special Masters' Orders, not to supplant or supersede them.

CONCLUSION

Accordingly, IT IS ORDERED THAT:

(1) Plaintiffs, as prevailing parties under 42 U.S.C. § 1988, are entitled to recover reasonable attorneys' fees and costs associated with bringing this contempt action. Plaintiffs' attorneys shall file with this court the necessary documentation within ten (10) days after entry of this order so that this court may determine whether the requested fees and costs are reasonable. Plaintiffs are urged to provide itemized, detailed, and descriptive statements and to provide the court with only those records relating to the instant contempt proceeding; i.e., Plaintiffs must segregate any unrelated costs and fees. Defendants will then be provided ten (10) days within which to file specific objections and supporting reasons for their objections. Plaintiffs will have five (5) days within which to reply to Defendants' objections. The

court will make its ruling after all memoranda have been carefully considered.

(2) The State officials responsible for making payments out of state funds shall take whatever steps are necessary to effect compliance with the *Hook* and *Gluth* orders concerning payment of Special Masters' fees and expenses ("Special Masters Orders"). However, a coercive civil contempt sanction of $10,000.00 per day, payable to the Registry for the District of Arizona shall be imposed if the defendants fail to comply with the *Hook* and *Gluth* Special Masters Orders.

According to the *Hook* Special Masters Order, the Special Masters are required to submit to Defendants' counsel by the first of each month, an itemized statement of fees, costs and expenses incurred the previous month. Defendants are then required to pay the monthly invoices within fourteen (14) days of receipt of such invoices. The $10,000.00 per diem fine shall be triggered automatically if Defendants fail to pay the invoices by the sixteenth of each month, and fines shall accrue until Defendants make the payments. Similarly, according to the *Gluth* Special Masters Order, Defendants are required to pay Special Masters' fees within fourteen (14) days of receipt of the special Masters' monthly invoice. Accordingly, the $10,000.00 per diem fine shall be triggered automatically if Defendants fail to pay the invoices by the fifteenth day after receipt of the invoices, and fines shall accrue until Defendants make the payments.

If Defendants fail to pay invoices within the designated time frames, Plaintiffs should immediately petition

this court for entry of an order providing for immediate payment and collection of fines.

IT IS SO ORDERED.

DATED: NOV 8 1995

/s/ DAVID ALAN EZRA
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

Evan Hook, et al., vs. State of Arizona, et al., No MC 95-86 PHX CAM, Civ. 73-0097 PHX CAM, Civ. 84-1626 PHX CAM, Civ. 90-0054 PHX CAM, Civ. 91-1808 PHX CAM (consolidated); ORDER GRANTING PLAINTIFFS' ATTORNEYS' FEES AND COSTS AND IMPOSING COERCIVE CIVIL SANCTIONS AGAINST DEFENDANTS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EVAN HOOK, et al., Plaintiffs, vs. STATE OF ARIZONA, Defendant.	No. MC 95-86 PHX CAM No. CIV 73-0097 PHX CAM No. CIV 84-1626 PHX CAM No. CIV 90-0054 PHX CAM No. CIV 91-1808 PHX CAM (consolidated) [PAYMENT OF SPECIAL MASTER FEES]
ALAN L. GLUTH, Named Class Representative. vs. ARIZONA DEPARTMENT OF CORRECTIONS, et al., Defendants.	ORDER (Filed Oct. 17, 1995)
FLETCHER CASEY, et al., Plaintiffs, vs. SAMUEL A. LEWIS, et al., Defendants.	
CHARLES L. ARNOLD, guardian ad litem on behalf of H.B., et al., Plaintiffs, vs. SAMUEL LEWIS, et al., Defendants.	

ORDER GRANTING PLAINTIFFS' MOTIONS FOR CONTEMPT AND DENYING DEFENDANTS' MOTIONS TO MODIFY

DAVID ALAN EZRA, District Judge[1]

The court heard Plaintiffs' motions for contempt and Defendants' motions for modification on September 28, 1995. Andrew S. Gordon & Coppersmith and Gordon appeared on the briefs or at the hearing on behalf of the Plaintiffs in *Hook v. Arizona*. Joel W. Nomkin, Kirsten B. Rosati and Rachel Rife Weiss of Brown & Bain appeared on the briefs or at the hearing on behalf of the Plaintiffs in *Gluth v. Kangas*. Assistant Arizona Attorney General James Morrow and Charles J. Cooper, Michael A. Carvin, and Michael W. Kirk of Shaw, Pittman, Potts & Trowbridge appeared on the briefs or at the hearing on behalf of Defendants in all three cases. After reviewing the motions, evidence, and supporting and opposing memoranda, the court GRANTS the Plaintiffs' motions to hold Samuel Lewis in contempt, finds Ariz.Rev.Stat.Ann. § 35-152 unconstitutional, and DENIES Defendants' motions to modify.

I. FACTS

A. History of the Consolidated Cases

Three prisoner civil rights cases are consolidated for the purpose of resolving the issue of payment of Special Masters' fees. Although the relevant facts are outlined in

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[1] This court is sitting by designation of the Chief Judge of the Ninth Circuit and with approval of the Chief Judge of the District of Arizona.

greater detail below, the instant motions involve three principal facts: (1) in all three cases, the court ordered Defendants to pay Special Masters' fees; (2) the Arizona Legislature enacted Ariz.Rev.Stat.Ann. § 35-152, which prohibits payment of Special Masters' fees without first obtaining a legislative appropriation for such payment; and (3) Defendants have refused to pay the fees since the enactment of § 35-152.

1. *Hook v. State of Arizona Dept. of Corrections*

Twenty-two years ago, this lawsuit arose from a dispute about mail regulations and restrictions in the Arizona Department of Corrections ("ADOC").[2] Evan Hook and ten other inmates filed a lawsuit alleging that ADOC mail policies violated their First and Fourteenth Amendment rights. The inmates claimed, inter alia, that they had constitutional rights to receive certain magazines as well as the right to send and receive specific mail. In 1973, the parties entered into a Stipulated Consent Decree ("the Decree" or "Consent Decree"), which included a comprehensive scheme of mail regulations. On October 19, 1973, the court entered an order approving the stipulation for the Consent Decree. The Decree was amended once on May 10, 1974.[3]

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[2] *Hook*, CIV 73-97 PHX CAM. A thorough history of all three cases is set forth in the *Hook* Order dated June 3, 1994.

[3] Pursuant to a stipulation of the parties, certain paragraphs of section VI and VII of the Decree were changed. The parties sought the changes pursuant to Fed. R. Civ. P. 60(b).

Over the past five years, the court has enjoined ADOC Director Samuel Lewis and the ADOC on several occasions from modifying the terms of the Consent Decree without filing the proper motion for modification pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[4] The record reveals that while the district court and the Ninth Circuit have advised Defendants that a Rule 60(b) motion is the proper vehicle through which the terms of the Decree may be changed, Defendants have continually failed to comply with the court's orders.

In the original Decree, the ADOC agreed to allow each inmate to receive up to three twenty-five pound packages between December 10th and 31st of each year. However, on October 4, 1990, the ADOC instituted a new policy limiting each inmate to one twenty-five pound package and imposed various other restrictions. ADOC implemented this policy in direct contravention of the Consent Decree and without court approval pursuant to

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[4] Fed. R. Civ. P. 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [if] . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) [for] any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Fed. R. Civ. P. 60(b).

Rule 60(b). The court enjoined Defendants from modifying the terms of the Decree without filing a motion for modification.[5]

Defendants appealed; the Ninth Circuit affirmed the district court and determined that the ADOC improperly attempted to change the provisions of the Consent Decree. The court stated that changes to the Decree should be made through Rule 60(b). *Hook*, 972 F.2d 1012, 1016-17 (9th Cir. 1992).

Thereafter, in October 1992, the ADOC filed a motion to modify the *Hook* Consent Decree. The ADOC requested that the court remove the provision allowing the inmates to receive Christmas food packages. However, in November and December of 1992, Director Lewis and ADOC issued memorandums requiring consumption of food packages by a particular date, also in violation of the court's order. In January 1993, the court enjoined Defendants from implementing the new policy.[6] The court

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[5] The court explicitly "enjoined, restricted and prohibited [Defendants] from making any changes in the implementation of Christmas food packages received pursuant to the Consent Decree approved by this court in *Hook v. Arizona* unless this court issues an order otherwise." Order, December 13, 1990.

[6] The court stated:

> Until there is an evidentiary hearing and the court has issued a ruling on the motion to modify in this case, the injunction issued on December 11, 1990 is in effect and the defendants cannot circumvent the injunction or violate that injunction piece by piece until there is nothing left of the *Hook* consent decree. As this Court has already informed defendants on numerous occasions since 1990, changes to the *Hook* decree are

advised Defendants that the Decree and injunctions would remain in effect until a modification was sufficiently supported by facts or law.

On January 31, 1994, after the Governor of the State of Arizona issued a press release banning specific magazines in state prisons, Director Lewis issued a memorandum to all inmates restricting certain types of magazines. Order, June 3, 1994. In February 1994, the court conducted an emergency hearing to consider Plaintiffs' petition for criminal contempt, civil contempt and sanctions. At that hearing, Defendants' attorneys reported that Director Lewis had withdrawn his Memorandum of January 31, 1994. No written withdrawal was offered and no motion to modify the magazine portion of the Consent Decree was made.

At an order to show cause hearing to determine whether Lewis' January 31, 1994 order constituted civil contempt, Lewis testified that he alone decided to issue the Memorandum of January 31, 1994.[7] The court found Director Lewis in civil contempt and assessed attorneys' fees and costs against Lewis. Order, June 3, 1994.

> possible. . . . If the Defendants believe that change should be made to the *Hook* decree, they should present evidence as to why changes should be made at the evidentiary hearing that they have requested in this matter. Prior to the hearing and a decision by this Court, defendants cannot unilaterally change the law.

Order, January 12, 1993.

[7] He claimed that the Governor did not direct him to issue the memo and that he had not consulted his attorneys with regard to his decision.

On June 8, 1994, the court appointed a special master and assistant special master to investigate ongoing allegations of noncompliance and to monitor the implementation of the Christmas package provision.[8] The order also set forth the details for instruction on payment by ADOC of the Special Masters' fees and expenses.[9] Defendants

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[8] The court concluded:

> [T]here is a history of noncompliance in this lawsuit. Indeed, the Court simply does not have the resources necessary to investigate the volume of alleged violations of the Consent Decree. Therefore, the Court is appointing a special master to report to the Court with a factual record needed to determine if ADOC is in compliance with the Consent Decree, and, if not, recommend specific means of enforcing the Decree.

Order, June 8, 1994, at 3.

[9] The compensation provisions state:

> (2) No later than the First day of each month, the special Master and the Assistant special Master shall each submit an itemized statement of their fees for the previous month to defendants' counsel. The special Master and Assistant special Master will be compensated by the defendants for their fees within fourteen (14) days of receipt of the special Master's monthly invoice. Such compensation will continue until the special Master's duties are fulfilled according to the Court's order.
>
> . . . .
>
> (4) If there is an objection to particular itemized expenses, payment will *not* be deferred pending the Court's determination of the objection. Defendants shall provide full payment to the special Master and if the Court determines that the objection is reasonable,

objected to the fees of the Assistant Special Master, but withdrew their objection shortly thereafter.

The court entered an order on August 4, 1994, denying, inter alia, Defendants' motion to stay the appointment of the Special Master; granting Defendants' motion to stay the payment of fees under the June 3, 1994 order pending appellate review; and granting in part Plaintiffs' motion for class certification.

2. *Gluth v. Kangas*

Gluth v. Kangas, 773 F. Supp. 1309 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (9th Cir. 1991), was brought on behalf of prisoners confined to the Central Unit of the Arizona State Prison at Florence. Plaintiffs alleged a denial of their constitutional right of access to the courts.[10] At the summary judgment stage, Defendants failed to come forward

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the special Master will reimburse defendants any amount the Court determines to be unreasonable.

(5) If the defendants object to the payment of any of the expenses or costs, they shall file those objections within thirty (30) days of receipt of the bill. The Court will examine that bill to determine if it is fair and reasonable under the circumstances.

Hook Order, June 8, 1994, at 11. The *Gluth* and *Casey* special master provisions are substantially the same.

[10] In their summary judgment motion, Plaintiffs alleged deficiencies in library access, legal assistant and law library clerk training, and ADOC policies toward indigent inmates.

with facts in response to Plaintiffs' motion and the court entered judgment against Defendants.[11]

The court entered an injunction mandating improvement in the operation of and access to the law library in April, 1990.[12] The court also appointed a special master to investigate methods to attain the goal of constitutionally adequate access to the courts. *See* Order, September 27, 1989.[13] The Special Master's responsibilities included monitoring ADOC compliance with the injunction and reporting to the court every six months. In August 1990, the court entered an injunction setting forth standards for determining whether an inmate qualifies for indigent

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[11] The court ruled that: (1) prisoners denied physical access to the prison law library must receive assistance from someone trained in the law; (2) prisoners were arbitrarily denied physical access to the library (despite existing regulations providing such access) and therefore the new regulations proffered by Defendants failed to insure that inmates would enjoy adequate access; and (3) the prison's indigency policy was unacceptable because it forced inmates to choose between purchasing necessary hygienic and legal supplies. *See* Memorandum Adopting Special Master's Proposed Order, April 25, 1989, at 8.

[12] The court highlighted Defendants' continuous refusal to cooperate in formulating the terms of injunction in the court's Memorandum dated April 27, 1990.

[13] The court stated, "The Special Master's work in this case has been invaluable. His expertise and understanding of the situation at the Central Unit have given him the ability to sit down and negotiate a permanent injunction that, not only is consistent with the goals of the Court's April 13, 1989 opinion, but is also agreeable to both sides. In fact, at the hearing, on March 29, 1990, defendants only had two objection to the special Master's proposed injunction." Memorandum Adopting Special Master's Proposed Order, April 25, 1989, at 13.

status and ordered that certain supplies be provided to them. Order, August 28, 1990.

However, pending Defendants' appeal to the Ninth Circuit, Plaintiffs filed a petition for order to show cause why the defendants should not be held in civil contempt. In support of their petition, Plaintiffs listed six pages of violations of the permanent injunction provisions. However, based upon stipulation of the parties, the court vacated the order to show cause hearing.

The Special Master filed his first evaluation report on January 3, 1991; his investigation "revealed significant areas of non-compliance." The Special Master concluded that legal access had not improved or had worsened during the six months after the permanent injunction was entered.

On appeal, the Ninth Circuit affirmed the district court "in all respects." *Gluth v. Kangas*, 951 F.2d 1504, 1512 (9th Cir. 1991). However, Defendants continued their noncompliance with the permanent injunction. For example, in 1993, Defendants fired the Florence law librarian who had been hired pursuant to court order. After an investigation, the Special Master found that the librarian was fired for cooperating with the Special Master. Also, in 1993 and 1994, the Special Master's investigations revealed at least two more violations of the permanent injunction.

The Special Master submitted a status report to the court on August 16, 1995. He concluded that Defendants' failure to "provide the required payments will end the ability of the Special Master and Assistant to carry out any aspect of the court ordered responsibilities. Even a

delay will necessitate the dismantling of the Special Master's operation." Special Master's Report, August 16, 1995, at 3.

3. *Casey v. Lewis*

Casey v. Lewis, CIV 90-0054, is a statewide class action civil rights case in which the members of the class include all prisoners in custody of the ADOC. Numerous issues were tried in the case, including Plaintiffs' allegations of inadequate medical, dental, and mental health care, handicapped access, access to the courts and due process. After a bench trial, the court ruled in favor of Plaintiffs on the access to the courts and mental health care issues,[14] and in favor of Defendants on the medical care, dental care, handicap access and due process issues. *Casey v. Lewis*, 834 F. Supp. 1553 (D. Ariz. 1992), *aff'd*, 43 F.3d 1261 (9th Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1997 (1995); *Casey v. Lewis*, 834 F. Supp. 1477 (D. Ariz. 1993); *Casey v. Lewis*, 834 F. Supp. 1569 (D. Ariz. 1993); *Casey v. Lewis*, 837 F. Supp. 1009 (D. Ariz. 1993).

The district court issued an order in October 1992, finding that ADOC policies violated inmates' constitutional rights of access to the courts. The court adopted a modified version of the injunction from *Gluth* and

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[14] The district court found that the mental health care system violated the Eighth Amendment. 834 F. Supp. 1477 (D. Ariz. 1993). Relevant to the mental health care issue, Defendants assert that Dr. Rundle, Special Master in the mental health portion of *Casey*, was removed from the case because of overbilling. This contention is not supported by the record.

appointed the Special Master from *Gluth* to propose a final injunction to cure the constitutional violations. *Casey v. Lewis,* 834 F. Supp. 1553 (D. Ariz. 1992).

The record reveals that Defendants have continually refused to comply with the permanent injunction entered on October 8, 1993. Such noncompliance includes a general failure to address ongoing violations and refusals to accommodate the special master's office in its investigatory duties. The court has threatened Defendants with contempt on numerous occasions. Although the district court and the Ninth Circuit denied requests by Defendants for a stay of the injunction, the Supreme Court granted a stay. *Lewis v. Casey,* 114 S. Ct. 1638 (1994). The Ninth Circuit subsequently affirmed the district court's ruling on the access to the courts issue and the Supreme Court has granted certiorari to review the decision. As a result of the stay, there has been little Special Master activity in *Casey* and there are nominal outstanding Special Master bills.

Defendants erroneously assert that the Supreme Court's stay in *Casey* terminated the Special Master's authority in *Gluth*. Therefore, Defendants contend that the Special Master in *Gluth* improperly continued to incur fees after the Supreme Court stayed the *Casey* access to the courts injunction. Defendants' claim is without merit.

The *Gluth* injunction, including appointment of the Special Master, was affirmed by the Ninth Circuit; *Gluth* is a final, separate decision. The court simply consolidated monitoring of *Casey* and *Gluth* relevant to the *Casey* access to the courts issue in order to save the Defendants

money. *Gluth* was not superseded by *Casey* and the Special Master was not acting without authority. In fact, the court clarified this issue in its Order, March 18, 1994, stating:

> the *Gluth* permanent injunction is still applicable to the Central Unit in Florence for those issues litigated in *Gluth*. In addition, the access to the courts permanent injunction in *Casey*, entered October 8, 1993, applies to Central Unit in Florence for those issues not litigated in *Gluth*, including attorney-client phone calls.

Order, March 18, 1994. Moreover, Defendants continued to pay the Special Masters even after the stay was granted in *Casey*.

B. Ariz. Rev. Stat. Ann. § 35-152

On April 19, 1995, Governor Symington signed into law a state statute prohibiting payment of fees and expenses incurred by special masters appointed by federal courts. Ariz. Rev. Stat. Ann. § 35-152. The statute became effective July 13, 1995, and provides:

> A. An officer, employee or agent of this state shall not open and maintain an account for the purpose of paying fees and expenses that are incurred by a special master who is appointed by a federal court.
>
> B. Notwithstanding any law to the contrary, an officer, employee or agent of this state is not subject to personal liability for complying with subsection A.

> C. An officer, employee or agent of this state shall not pay fees and expenses for special masters appointed by a federal court unless the legislature appropriates monies for the payment of the special master fees and expense.
>
> D. Notwithstanding any law to the contrary, the failure of the legislature to appropriate monies for the payment of fees and expenses for special masters appointed by a federal court does not subject an officer, employee or agent of this state to personal liability for the special master fees and expenses.
>
> E. This section applies to all bills for fees and expenses for special masters appointed by a federal court that are submitted after the effective date of this section.

Ariz. Rev. Stat. Ann. § 35-152.

Samuel Lewis, the Director of the ADOC and a defendant in all three cases, was a key supporter of the legislation. He testified before the Senate Committee on Government Reform on March 21, 1995, and urged the state legislature to enact the measure for the specific purpose of asserting "state's rights" and challenging the federal district court's actions in prisoner cases.[15]

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[15] Lewis stated, "I believe that this is a case of state's rights. I think it is this time for us to find out exactly where the power of the federal government begins and ends so that the Department simply becomes the instrument by which we attack this in the courts." *See* Transcript of Hearing Before the Arizona State Senate Committee on Government Reform, March 21, 1995, at 7; Minutes of March 21, 1995 Hearing before Arizona State Senate Committee on Government Reform, at 4.

State legislators also acknowledged that the intent of the provision was to set up a confrontation with the federal courts over states' rights.[16] *See* Testimony of Representative Baird, Transcript of Hearing Before the Arizona State Senate Committee on Government Reform, March 21, 1995, at 3.

On August 2, 1995, the Special Master in *Gluth* and *Hook* submitted his invoices for services performed by his office during July 1995, and the Assistant Special Master submitted her invoices for *Gluth, Hook,* and *Casey*. Pursuant to the appointment orders, ADOC was required to pay these bills by August 16, 1995. Defendants were also required to reimburse expenses within that time period. Those bills have not been paid. Additionally, the bills submitted by the Special Master and Assistant Special

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[16] Representative Earnest Baird, a co-sponsor of House Bill 2523 (§ 35-152), explained, "basically what we are trying to do here is set up a confrontation on who has the appropriations power in this State. Is it the State Legislature who represents the people of this State or is it a federal Judge who has been appointed for life and ends up abusing his position as a federal Judge. . . . " Transcript of Hearing Before the Arizona State Senate Committee on Government Reform, March 21, 1995, at 3.

Defendants allege that they have had "long-standing" objections to the unnecessary fees and costs. In their opposition to Plaintiffs' order to show cause, Defendants discuss the special master fees at length, asserting that billing by the Special Masters has been careless, unsupported and excessive. However, any alleged unreasonableness or inaccuracies in billing by the special masters should be brought to the attention of the court pursuant to the procedures set forth in the orders appointing the special masters. *See, e.g., Hook* Order, June 8, 1994, at 11. Accordingly, the court declines to address Defendants' contentions here.

Master in September 1995 for the month of August 1995 have not been paid by Defendants.

II. DISCUSSION

A. Federal Courts and Prison Regulation

It is well settled that federal courts can invoke judicial authority if local and state authorities, who have primary responsibility for curing constitutional violations, fail in their affirmative obligations. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1979). To that end, "[f]ederal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights." *Stone v. City of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992) (citing *Hutto*, 437 U.S. at 687 n.9), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1050 (1993). While federal concerns may enter into "institutional litigation involving correctional facilities, they do not automatically trump the powers of the federal courts to enforce the Constitution or a consent decree." 968 F.2d at 861.

B. The Supremacy Clause

Plaintiffs argue that this court has the authority to order payment of the Special Masters' fees despite the recent enactment of Ariz. Rev. Stat. Ann. § 35-152, under the Supremacy Clause of the United States Constitution.[17]

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[17] Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

Defendants response is twofold: first, Defendants claim that the statute should not be found unconstitutional because alternative measures are available to the Special Masters; second, Defendants argue that the Eleventh Amendment prevents this court from finding the state statute unconstitutional.

A state statute that has the effect of thwarting a federal court order enforcing federal rights "cannot survive the command of the Supremacy Clause of the United States Constitution." *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (citations omitted); *see also Spain v. Mountanos*, 690 F.2d 742, 746 (9th Cir. 1982). In *Washington v. Washington State*, the Ninth Circuit affirmed a district court order directing the Washington State Department of Fisheries to adopt regulations to protect Indian fishing rights. In a parallel state court proceeding, the Washington court concluded that the order was void because the federal court lacked the authority to order state officials "to do any act they were not authorized by laws of the state from which they derive[d] their power." *See Puget Sound Gillnetters Ass'n v. Moos*, 565 P.2d 1151, 1155 (Wash 1977) (cited in *Spain v. Mountanos*, 690 F.2d at 746). The United States Supreme Court granted certiorari in both proceedings, affirmed the Ninth Circuit, and vacated the Washington Supreme Court decision. The Supreme Court

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> Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

specifically rejected the state court ruling regarding state officials' capacity to act under the state law and held that a state-law prohibition against compliance with a district court order could not survive the Supremacy Clause. 443 U.S. at 695.

In *Spain v. Mountanos,* the Ninth Circuit followed the Supreme Court's decision in *Washington v. Washington State.* 690 F.2d at 746. *Spain* involved unconstitutional conditions of confinement at a California state prison. The district court entered an injunction against specific prison practices; the Ninth Circuit affirmed in part and reversed in part. *Id.* at 743-44. Upon remand, the parties entered into a settlement agreement pursuant to which the defendants were to pay plaintiff attorneys' fees. *Id.* at 744. However, the California state legislature refused to appropriate the funds for payment of attorneys' fees. *Id.*

The *Spain* court affirmed the district court order compelling state officials to pay the claim for 42 U.S.C. § 1988 attorneys' fees, pursuant to Fed. R. Civ. P. 70. 690 F.2d at 746. One of the state attorney general's arguments was that the court order was improper because the state statute prohibited payment without legislative appropriations. 690 F.2d at 745. The Ninth Circuit relied on *Washington v. Washington State,* and held that, "[u]nder the Supremacy Clause of the United States Constitution, a court, in enforcing federal law, may order state officials to take actions despite contravening state laws." *Id.* at 746. The court concluded that, "a state cannot frustrate the intent of section 1988 by setting up state law barriers to block enforcement of an attorney's fees award." *Id.*

Accordingly, this court has the authority to order compliance with the federal district court orders even though the action may violate Ariz. Rev. Stat. Ann. § 35-152.

Defendants admit that there is a conflict between the federal court orders and the newly enacted state statute prohibiting payment in the absence of legislative action. However, Defendants present a lengthy argument in their opposition to Plaintiffs' contempt motions that the conflict between the federal orders and the state statute would not exist if the court would only change its orders.

The district court appointed the Special Masters pursuant to Fed. R. Civ. P. 53,[18] to monitor and enforce Defendants' compliance with court-ordered remedial measures addressing constitutional violations of prison inmates. The Special Masters were appointed after court monitoring alone had been demonstrated to be inadequate.

Section 35-152 provides that an officer, employee or agent of the state will not pay special master fees for masters appointed by a federal court unless the legislature appropriates the money. Ariz. Rev. Stat. Ann. § 35-152(C). Defendants have relied on this provision to justify nonpayment of special master fees. Although the Arizona statute conflicts with the federal court orders regarding payment of the Special Masters and with Rule 53, defendants assert that the court has an obligation to "harmonize" its order with the statute. Transcript of Hearing, September 28, 1995, at 33.

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[18] Rule 53 requires the court to fix the compensation for special masters and provides that compensation "shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. . . . " Fed. R. Civ. P. 53.

At the contempt hearing on September 28, 1995, Defendants stated that the notion of comity was at the heart of their argument. *Id.* at 30. They asserted, "when a federal court determines that a federal substantive right can be enforced or vindicated through a remedial approach that respects state law, the federal court must respect state law and adopt that remedial measure. . . . [I]f there's an alternative available that respects state law, it cannot adopt a remedial measure that does not respect [or conflicts] with state law." *Id.* Defendants' argument is flawed in two key respects.

First, under Defendants' theory, a state would have unbridled authority to enact statutes in order to insulate it from federal court orders and from federal laws. By enacting Ariz. Rev. Stat. Ann. § 35-152, the Arizona Legislature has attempted to limit the jurisdiction of the federal court. Specifically, Section 35-152 excepts Defendants from their responsibility under the court's order to pay the masters; that order was issued pursuant to Fed. R. Civ. P. 53(a). In effect, then, Defendants modify Rule 53(a) as it applies in Arizona. By extension, Defendants' argument would apply equally to orders of the Ninth Circuit or of the Supreme Court.[19] Defendants' argument has no

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[19] The court identified this flaw in Defendants' argument at the contempt hearing:

> the answer lies in the issue of whether a state has the authority in a circumstance like this to essentially rewrite the Federal Rules of Civil Procedure by enacting laws confining, if you will, federal court jurisdiction. Because in this circumstance, we have the State in effect attempting to rewrite the Federal Rules of Civil Procedure and remove in the State of Arizona an option otherwise available under those rules . . . If we follow Arizona law, Arizona will be the only state, to my

logical stopping point.[20]

> knowledge, in which that option would be available . . . So Arizona would be the only state in which the Federal Rules of Civil Procedure on the appointment of Special Masters in state cases would be unavailable. So in effect, we would be allowing the Arizona state legislature to assume a power of Congress, a power exclusively within the authority of the United States Congress, and that is to enact those rules in conformance with the Supreme Court of the United States.

Hearing Transcript, September 28, 1995, at 37-38.

[20] The following excerpt from the transcript of the contempt hearing further highlights the problem with Defendants' argument:

> THE COURT: Well, what if Arizona had passed a statute, [that] said, "Well, you know, we're really tired of this whole business of prisoner litigation, and we're not going to cooperate with the federal court in any regard, so what we are going to do now is we're going to pass a statute that says all Arizona state officials are hereby prohibited from cooperating with any federal court order regarding prisons," just period, period, is that okay?. . . .
>
> MR. COOPER: No, Your Honor, I don't think that would be okay.
>
> THE COURT: Well . . . doesn't this have the same, once only slightly removed, doesn't this have the same effect? What it says is: "We will not pay any Special Masters' fees ordered imposed by the federal court." How is that any different from saying: "We are not going to cooperate. We will not in any way enforce or implement

Second, Defendants assume that Judge Muecke, in appointing special masters in these cases, did not consider other alternatives available to the court, such as the monitoring of compliance by a magistrate. The court cannot agree with Defendants; the record shows that Judge Muecke was aware of the court's alternatives and made a determination that a special master was best suited to

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any federal court order regarding prison conditions?"

. . . .

MR. COOPER: The difference is that it would not be possible. It would not be possible to effectuate the Court's remedy for constitutional violations in the face of that statute.

THE COURT: The judge could certainly harmonize his decision or her decision with the Arizona state statute by just not issuing any orders that would in any way modify conditions at Arizona state prisons or penitentiaries.

MR. COOPER: And the constitutional rights of the prisoners would go unvindicated.

THE COURT: That's right.

MR. COOPER: And that's not the argument we're advancing. That is not the case.

Id. at 43-45. However, that *is* the case. Defendants fail to recognize that if they prevailed in their argument, the constitutional rights of the Plaintiff classes might indeed "go unvindicated." It is clear from the record that Judge Muecke was of this very opinion when he decided to appoint the special masters. Their oversight and expertise was, and is, as demonstrated by the record, necessary to compel compliance by the recalcitrant Defendants to remedy ongoing constitutional violations at various state prisons.

perform the demanding monitoring and reporting functions. Furthermore, Defendants have pointed to nothing that has occurred subsequent to the appointment of the masters, including the enactment of Ariz. Rev. Stat. Ann. § 53-152, to demonstrate that factors upon which Judge Muecke based his initial decision have become irrelevant or inapplicable.

Also at the hearing, Defendants stated several times, "our position is premised on the proposition that an alternative remedial technique is available. If that is wrong, then, yes . . . we lose." Defendants suggest three alternatives to monitoring by a special master: (1) Plaintiffs are capable of self-monitoring and can bring any noncompliance to the court's attention; (2) the court should appoint a magistrate judge to monitor the case; and (3) the court should use the procedure set forth in Ariz. Rev. Stat. Ann. § 35-152 to obtain appropriation from the legislature. *See* Defendants' Opposition to Order to Show Cause, at 34-35. None of these options present a realistic alternative remedial technique that can supplant the role of the Special Master.

First, this court finds that options one and two were necessarily considered by Judge Muecke when he determined that the appointment of special masters was vital for monitoring Defendants' compliance with court orders. *See* Transcript of Contempt Hearing, September 28, 1995, at 34-37. Second, following option three would necessitate granting Defendants' instant Motion for Modification. As discussed below in Part II, the court denies Defendants' motion. Accordingly, as Defendants note, since no effective alternatives are available, they cannot prevail.

Defendants also argue that Ariz. Rev. Stat. Ann. § 35-152 should not be found unconstitutional because the court orders which appoint special masters do not vindicate substantive federal rights or provide the necessary remedial means for the vindication of federal rights. This argument is without merit. All three cases in this action involve civil rights claims pursuant to 42 U.S.C. § 1983 and violations of First, Eighth and Fourteenth Amendment rights. The injunctions issued all seek to provide relief from constitutional violations and the Special Masters were appointed to prevent the recurrence of such constitutional violations.

Therefore, insofar as Ariz. Rev. Stat. Ann. § 35-152 purports to effect the lawful orders of the United States District Court requiring payment of the Special Masters' fees, it is unconstitutional and void.

C. Eleventh Amendment

Defendants further assert that the Eleventh Amendment[21] prevents this court from finding Ariz. Rev. Stat. Ann. § 35-152 unconstitutional. Plaintiffs argue that the Eleventh Amendment provides no defense for Defendants and that Defendants' arguments are not properly raised in a contempt proceeding because they attack the merits of the injunctions and consent decree.

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[21] The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

In general, a party in contempt cannot collaterally attack the underlying order in a contempt proceeding. *See Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 637 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984).[22] Rather, an order by a court with subject matter and personal jurisdiction must be obeyed by the parties until reversed by orderly and proper proceedings, "without regard for even the constitutionality of the Act under which the order was issued." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947). Relevant to collateral attack of an underlying order in a contempt proceeding, the Supreme Court has stated:

> It would be a disservice to law if we were to depart from the longstanding rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

United States v. Rylander, 460 U.S. 752, 756 (1983).

The merits of the injunction and the appointment of the Special Master in *Gluth* were fully litigated before the district court and then affirmed by the Ninth Circuit. *See Gluth*, 951 F.2d at 1507. In *Hook*, the parties entered a consent decree formulated with the participation of Defendants and Defendants never filed a direct appeal.

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[22] In *Halderman*, the Third Circuit found that strong policy reasons militated against permitting contemnors to lodge direct attacks of underlying orders. *See* 673 F.2d at 636.

The mental health care injunction in *Casey* is on appeal to the Ninth Circuit and has not been stayed by either the district court or Ninth Circuit, and the Supreme Court has granted certiorari to review the *Casey* access to the courts issue. Accordingly, Defendants have had ample opportunity to raise any Eleventh Amendment issues before and are thus precluded from doing so now. The recent enactment of Ariz. Rev. Stat. Ann. § 35-152 has no bearing on Defendants' Eleventh Amendment arguments.

Defendants argue that their Eleventh Amendment claim is allowed in this proceeding because it challenges subject matter jurisdiction. The Supreme Court has held that the Eleventh Amendment "partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). However, the Supreme Court later clarified that, "because of the importance of state law in analyzing Eleventh Amendment questions and because the state may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this court on its own motion." *Patsy v. Bd. of Regents*, 457 U.S. 496, 515 n.19 (1982). The Supreme Court has also recognized that an Eleventh Amendment immunity defense may be expressly waived. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). The Ninth Circuit recently clarified that, "Eleventh Amendment immunity, unlike a true jurisdictional bar, may be expressly waived . . . and may even be forfeited by the state's failure to assert it." *ITSI T.V. Prod. v. Agricultural Ass'n*, 3 F.3d 1289, 1291 (9th Cir. 1993). In

ITSI, the Ninth Circuit held Eleventh Amendment immunity is treated as an affirmative defense that is waived if not asserted on direct appeal. *Id.*

Here, the appeal in *Gluth* is final; the *Hook* appeal pertaining to the Special Master has been dismissed and that order is final; and the *Casey* injunctions are on appeal. Under the Ninth Circuit's ruling in *ITSI*, the Defendants' Eleventh Amendment immunity claim has been waived for *Gluth* and *Hook* and cannot be raised in this proceeding. Defendants in *Casey* may still raise their claim on direct appeal but they cannot raise the claim in this proceeding. Defendants must therefore adhere to the district court order until stayed, set aside or modified by the court. *United Mine Workers*, 330 U.S. at 293-94.

Moreover, the law is clear that the Eleventh Amendment does not preclude the district court from ordering a state to pay fees and costs in civil rights cases. *Hutto v. Finney*, 437 U.S. 678, 696 (1978); *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980). The Special Masters' fees and expenses are costs in the case. *See* Fed. R. Civ. P. 53, 54(d)(1); *National Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 545 (9th Cir. 1987).[23] The district court can properly order payment of the Special Master fees and costs under Fed. R. Civ. P. 53 without violating

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[23] In *Mullen*, the Ninth Circuit held that the fees and expenses of the special master appointed under Rule 53 were costs of the lawsuit and could be assessed against the United States. 828 F.2d at 545-46. Also, Defendants' argument that *Hutto* can be distinguished because 42 U.S.C. § 1988 specifically mentions attorneys' fees as costs is without merit.

the Eleventh Amendment. The court finds that the Eleventh Amendment does not preclude a imposition of special masters' fees upon Defendants.

D. Contempt Power

A federal court has the inherent power to enforce court orders through civil contempt. *See Spallone v. United States*, 493 U.S. 265, 276 (1990); 18 U.S.C. § 401(3).[24] A district court has wide latitude in determining whether there has been a contemptuous defense of a court order. *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1050, 122 L.Ed.2d 358 (1993) (citations and internal quotations omitted). The Ninth Circuit's rule regarding contempt "has long been whether defendants have performed 'all reasonable steps within their power to insure compliance' with the court's orders." *Stone*, 968 F.2d at 856 (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 404 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977)). The moving party bears the burden

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[24] 18 U.S.C. § 401(3) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
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> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401(3).

of establishing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. *See Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). The burden then shifts to the contemnors to demonstrate why they were unable to comply. *See Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). The contemnors must show that they took every reasonable step to comply. *See Sekaquaptewa*, 544 F.2d at 406. In assessing whether an alleged contemnor took "every reasonable step" to comply with the terms of a consent decree, a district court can consider (1) a history of noncompliance and (2) a failure to comply despite the pendency of the contempt motion. *Stone*, 968 F.2d at 857. A party's subjective intent is irrelevant.[25]

Sanctions for civil contempt may be imposed to coerce obedience to a court order, or to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior, or both. *United Mine Workers*, 330 U.S. at 303-04; *Perry v. O'Donnell*, 759 F.2d 702, 705 (9th Cir. 1985). If the contempt sanction is compensatory, those sanctions must be limited to actual losses sustained as a result of the contemptuous behavior. *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986) (citations omitted).

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[25] "A party cannot disobey a court order and later argue that there were 'exceptional circumstances' for doing so. This proposed 'good faith' exception to the requirement of obedience to a court order has no basis in law." *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir.1987).

Plaintiffs seek to have this Court impose civil contempt sanctions against Samuel Lewis.[26] Plaintiffs point out that the imposition of sanctions is expressly authorized by Fed. R. Civ. P. 70[27] and Fed. R. Civ. P. 53(a).[28]

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[26] Specifically, Plaintiffs petition the court to impose sanctions against Lewis for payment of the outstanding fees and expenses, a fine of $1,000.00 per day until compliance, and the amount of attorneys' fees and costs incurred to bring this petition. The court will determine appropriate sanctions after the November 1, 1995 hearing.

[27] Fed.R.Civ.R. 70 provides in relevant part:

> If a judgment directs a party to . . . perform any [ ] specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application by the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge in contempt.

Fed. R. Civ. P. 70.

[28] Rule 53(a) states, "when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party." Fed. R. Civ. P. 53(a).

Federal Rule of Civil Procedure 69 sets forth the procedure for a writ of execution and provides, in relevant part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and

Plaintiffs have demonstrated by clear and convincing evidence violations of the court's specific and definite court orders; there is no dispute that Defendants have failed to pay the Special Master's fees and expenses. Accordingly, Defendants must show they have taken all reasonable steps to comply with the court orders.

Defendants argue that Ariz. Rev. Stat. Ann. § 35-152 precludes their compliance. In their motion for modification, Defendants assert that they are in a "catch 22" situation, caught between the court's orders and Ariz. Rev. Stat. Ann. § 35-152. Defendants submit that Arizona's Department of Administration, Risk Management office, is not able to process the recent statements for special master fees and expenses due to the enactment of Ariz. Rev. Stat. Ann. § 35-152 and the lack of the appropriation of monies from the Legislature. Importantly, however, Defendants are not arguing that the state lacks the funds to pay the fees and expenses. Instead, Defendants assert a "legal impossibility" defense, alleging that they cannot comply with federal court orders without violating Ariz. Rev. Stat. Ann. § 35-152.

A similar argument was rejected by the Third Circuit in *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984), a case

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> procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Fed. R. Civ. P. 69(a).

which is particularly persuasive here.[29] Presented with similar facts, the Third Circuit affirmed the district court's contempt order; the court first concluded that the defendants should have made a Rule 60(b) motion instead of resorting to "self-help," i.e., ceasing payments to the Special Masters. *Id.* at 637-38. Second, the court rejected the defendants' "legal impossibility" argument and held, "in the circumstances here, where the contemnor participated in effectuating the change in the law which is alleged to establish a legal impossibility, sound policy does not permit the by-passing of the orderly route

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[29] That case involved a district court order appointing a special master to supervise the planning and implementation of remedial measures to address, inter alia, constitutional violations of mentally retarded plaintiffs in a state institution. *Id.* at 629-30. Pursuant to the district court's order, the Commonwealth of Pennsylvania bore the costs of the special master's office. *Id.* at 630-31. The Secretary of the Department of Public Welfare, in testimony before the state legislature, voiced strong objections to the use of the special master and urged the legislature to reduce the amount of the appropriation for payment of the special master from approximately $900,000 to a lesser amount. *Id.* at 632-34. The legislature passed an appropriation bill in the amount of $35,000, stating, "It is the intent of the [legislature] that this appropriation be used for shutdown costs and that no other funds of the Commonwealth be spent for these functions." *Id.* at 633. Thereafter, "as soon as the appropriations bill became law the Department of Public Welfare . . . took the position that they would not obey the [court] orders," and made no Rule 60(b) motion for relief from the court orders. *Id.* at 634. The district court found that the Secretary had "instigated the action of the legislature for the purpose of dismantling the Masters' offices" and held the defendants in contempt. *Id.*

to appellate review provided by Rule 60(b)." *Id.* at 639;[30] *see also United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980) (while "[i]nability to comply with an order is ordinarily a complete defense to a charge of contempt[,] [a]n exception exists when the person charged is responsible for the inability to comply"); *cf. La Raza Unida v. Volpe*, 545 F.Supp. 36, 39 (N. D. Cal. 1982) ("[S]tates should not be allowed to shield themselves from federal court judgments by enacting laws requiring legislative appropriations before payment of judicial awards. Otherwise, states would in effect be immune from paying attorneys' fees awards, even though *Hutto* held that the [E]leventh [A]mendment does not apply to the payment of such awards.").

Halderman is squarely on point. The record reveals that Director Lewis and the Arizona State Legislature were well aware that disregard of federal court orders

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[30] The *Halderman* court stated:

> [I]t cannot be said that this is a case in which no other route to appellate review except self-help was available to the contemnors. Moreover by resorting to self-help in a situation where a post-judgment change in the law is arguably a reason for relief from the judgment, a party subject to that judgment deprives the other side of the notice and opportunity to be heard which Rule 60(b) would otherwise require, and of the protection in that rule that "(a) motion under this subdivision (b) does not affect the finality of the judgment or suspend its operation." . . . The self-help route leaves the trial court with no alternative except restoration of the status quo ante bellum by a coercive contempt order.

Id. at 637.

could result in civil contempt. Nevertheless, Defendants unilaterally decided to defy the court's orders regarding payment of the Special Masters subsequent to the enactment of Ariz. Rev. Stat. Ann. § 35-152. Defendants' conduct seems particularly egregious since they were instructed by the Ninth Circuit over five years ago that they must comply with the orders until a court makes a modification pursuant to a Rule 60(b) petition.[31] *See, e.g., Hook v. Arizona Dept. of Corrections*, 972 F.2d 1012 (9th Cir. 1989).

Director Lewis argues that he has made several attempts to request payment for the July special master's fees and expenses. On August 2, 1995, Defendants requested the Department of Administration, Risk Management Division, to deposit a warrant in the amount of $5,976.18 in the special master's account. On August 3, 1995, Defendants sent the fee statements to the DOA requesting payment directly to the special master. On August 10, 1995, Director Lewis requested emergency placement on the next agenda of the Joint Legislative Budget Committee to obtain appropriations. On August 23, 1995, Director Lewis sent a letter to Governor Symington regarding a special session of the legislature to appropriate the funds. Defendants contend that they "are making every effort to present the issue to the Arizona Legislature. . . . " Defendants' Opposition, at 49. These efforts, however, only evidence Defendants' attempt to

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[31] Indeed, the court may also consider Defendants' history of noncompliance in all three cases, discussed above, in determining whether civil contempt is an appropriate remedy. *See, e.g., Stone*, 968 F.2d at 857.

comply with Ariz. Rev. Stat. Ann. § 35-152, *not* with the court's orders to pay the special masters.

The court finds that Defendants have neither substantially complied nor taken all reasonable steps within their power to assure compliance with the court's orders. Accordingly, the court GRANTS Plaintiffs' motion to hold Samuel Lewis in contempt.

II. Defendants' Motions for Modification

On the day payment became due on the Special Masters' fees and expenses, Defendants filed a motion for modification.[32] Defendants seek a modification of prior court orders extending the time for payment of the Special Masters' fees and expenses in order to avoid possible sanctions and personal liability, and to present the Special Masters' statements to the state legislature. Defendants fail to cite any law in their motions to support modification. Rather, they assert a "catch 22" argument and state that modification is necessary in order for them to present the billing statements to the Arizona legislature. In their reply brief, Defendants state that "[t]he gravamen of defendants' motion is that the enactment of A.R.S.

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[32] At the contempt hearing, Defendants failed to offer a valid reason why the modification motion was not filed before Defendants ceased payments to the special masters. Counsel for Defendants simply stated, "I wish I had a good answer, but I don't. State officials and legislatures, executive branch officials, their lawyers, were scrambling to do something about this problem – ." Defendants' counsel also admitted that failure to pay the special masters was a deliberate act. Transcript of Hearing, September 28, 1995, at 26-27.

§ 35-152 effected a change in law requiring modification of the outstanding orders with respect to payment of the masters in these cases." Defendants' Reply Brief, at 2. Defendants also reassert their constitutional arguments in their reply brief. *Id.* at 2-4.

In their reply brief, Defendants cite *Rufo v. Inmates of Suffolk Jail*, 502 U.S. 367 (1992), for the proposition that, "a change in law will justify modification of a decree in an institutional reform case." Defendants' Reply Brief, at 2. However, in *Rufo*, the Supreme Court stated:

> [a] consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties had become impermissible under *federal* law. But modification of a consent decree may be warranted when the statutory or decisional law has *changed to make legal what the decree was designed to prevent.*

502 U.S. at 375 (emphasis added). Additionally, the Court stated that even if a moving party can meet its burden of establishing a change in the law warranting modification of a consent decree, "the District Court should determine whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 391. One consideration is that, "a modification must not create or perpetuate a constitutional violation."[33] *Id.* *Rufo* does not support

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[33] The Supreme Court outlined two other factors concerning consent decree modifications: the proposed modification should not rewrite a consent decree to "conform[ ] to the constitutional floor," and the public interest and allocation of powers within the federal system should be considered. 502 U.S. at 391-92.

Defendants' petition for modification for two key reasons: first, the Court was referring to a significant change in federal law that would "legalize" the conduct at which the injunction was aimed; second, in light of the history of continuous noncompliance by the Defendants, the court believes that a modification of the court order would indeed perpetuate the identified constitutional violations.[34]

Furthermore, as discussed above, Defendants' "legal impossibility" argument lacks merit and does not justify a modification of the court orders regarding payment of the Special Masters. Defendants seem to be arguing that compliance with district court orders may place them in contempt of state courts. Regardless of whether an Arizona state court would hold defendants in contempt for violating Ariz. Rev. Stat. Ann. § 35-152, "Supremacy Clause considerations require that the judgment of the federal court be respected." *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986) (citing *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979)), *cert. denied*, 479 U.S. 1067 (1987).

Essentially, the Defendants suggest that the legislature of the State of Arizona be given the power to require a federal court to modify or "harmonize" its orders to

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[34] Indeed, a modification might threaten to undermine the substantive provisions of the injunctions. The Special Master has been instrumental in ensuring compliance with the injunctions, and has stated that he will be unable to "carry out any aspect of [his] court ordered responsibilities," and that a "delay [in payment] will necessitate the dismantling of the Special Master's operation." Special Master's Report, August 16, 1995, at 3.

comply with the Arizona state law. In other words, that the Arizona legislature be recognized as possessing the authority to enact statutes which have the effect of modifying or overturning a federal court's lawful orders enforcing the U.S. Constitution. The power to overturn or require modification of a federal district court order in constitutional cases lies under the Constitution with the Court of Appeals and the United States Supreme Court. Even the Congress of the United States lacks the power which the Arizona state legislature would enrobe itself.

In light of all facts presented – including Defendants' long history of noncompliance with court orders, Defendants' pivotal role in the enactment of Ariz. Rev. Stat. Ann. § 35-152, and Defendants' unsupported statement that, "the Governor and his senior staff are presently discussing with the leadership of the Arizona Legislature a special session to deal with the issues raised by the enactment" of Section 35-152[35] – the court concludes that a modification is not warranted. The court therefore DENIES Defendants' Motion for Modification.

III. CONCLUSION

For the reasons stated above the court GRANTS Plaintiffs' Motion to hold Samuel Lewis in Contempt, finds Ariz. Rev. Stat. Ann. § 35-152 unconstitutional, and DENIES Defendants' Motion for Modification. The court

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[35] *See* Defendants' Motion for Modification, at 4.

will determine the proper sanctions after further hearing on the matter.

IT IS SO ORDERED.

DATED: OCT 13 1995

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

Evan Hook, et al. vs. State of Arizona, et al., No. MC 95-86 PHX CAM, Civ. 73-0097 PHX CAM, Civ. 84-1626 PHX CAM, Civ. 90-0054 PHX CAM, Civ. 91-1808 PHX CAM (consolidated); ORDER GRANTING PLAINTIFFS' MOTIONS FOR CONTEMPT AND DENYING DEFENDANTS' MOTIONS TO MODIFY

APPENDIX D

Federal Rules of Civil Procedure

Rule 53. Masters

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the

parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) Application to Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

APPENDIX E

A.R.S. § 35-152. Special masters; payment of fees and expenses

A. An officer, employee or agent of this state shall not open and maintain an account for the purpose of paying fees and expenses that are incurred by a special master who is appointed by a federal court.

B. Notwithstanding any law to the contrary, an officer, employee or agent of this state is not subject to personal liability for complying with subsection A.

C. An officer, employee or agent of this state shall not pay fees and expenses for special masters appointed by a federal court unless the legislature appropriates monies for the payment of the special master fees and expenses.

D. Notwithstanding any law to the contrary, the failure of the legislature to appropriate monies for the payment of fees and expenses for special masters appointed by a federal court does not subject an officer, employee or agent of this state to personal liability for the special master fees and expenses.

E. This section applies to all bills for fees and expenses for special masters appointed by a federal court that are submitted after the effective date of this section.